Supreme Court, U.S.
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85-1295

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

J.C. TYUS,

Petitioner,

v.

FRANCISCO EUGENIO MARTINEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether allegations that a police officer conspired with the presiding trial judge to cause a mistrial of Plaintiff's criminal trial by offering to give improper and prejudicial testimony, where the officer never did give such testimony and the mistrial was declared "for quite different reasons" which arose prior to the alleged conspiracy, are legally sufficient to state a claim under 42 U.S.C. §§1981, 1983, 1985(3), 1986 and the Fourteenth Amendment.

2. Whether a police officer is entitled to a pretrial dismissal of claims brought against him under 42 U.S.C. §§1981, 1983, 1985(3), 1986, and the Fourteenth Amendment, based on qualified immunity under *Harlow v. Fitzgerald*, where the allegations against the police officer contend he conspired with the presiding trial judge to cause a mistrial of Plaintiff's criminal trial by offering to give improper and prejudicial testimony, and where there are no allegations the officer actually gave such testimony, and where such alleged conduct does not violate any clearly established constitutional principle.

3. Whether a claim of conspiracy is cognizable under 42 U.S.C. §§1981, 1983, and the Fourteenth Amendment.

LIST OF ALL PARTIES TO PROCEEDING BELOW

FRANCISCO EUGENIO MARTINEZ,

Plaintiff-Appellant,

v.

FRED M. WINNER, Chief Judge of the United States District Court for the District of Colorado, individually and in his official capacity; JOSEPH M. DOLAN, United States Attorney for the District of Colorado, individually and in his official capacity; SUSAN ROBERTS, Assistant United States Attorney, individually and in her official capacity; JOHN R. BARKSDALE, Assistant United States Attorney, individually and in his official capacity; DAN CHRISTOPHER, Assistant United States Attorney, individually and in his official capacity; JAN CHAPMAN, Assistant United States Attorney, individually and in her official capacity; UNITED STATES DEPARTMENT OF JUSTICE, a governmental entity; FEDERAL BUREAU OF INVESTIGATION, a governmental entity; "JOHN DOE" and other unnamed and unknown agents in the Denver Office of the Federal Bureau of Investigation, individually and in their official capacities; MATT DUNN, Deputy United States Marshal, individually and in his official capacity; PEYTON BAER, Deputy United States Marshal, individually and in his official capacity; LES WEISENHORN, Deputy United States Marshal, individually and in his official capacity; CITY AND COUNTY OF DENVER, a governmental entity; DALE A. TOOLEY, District Attorney for the City and County of Denver, individually and in his official capacity; CASTELAR GARCIA, JR., Deputy District Attorney, individually and in his official capacity; CITY OF DENVER POLICE DEPARTMENT, a governmental entity; ARTHUR DILL, Chief of Police, individually and in his official capacity; ROBERT SHAUGHNESSY, Chief, City of Denver Police Department, individually and in his official capacity; ROBERT NICOLETTI, Captain, Denver Police Department, individually and in his official capacity; J.C. TYUS, Detective, Denver Police Department; "JOHN DOES," and other unnamed and unknown agents of the Denver Police Department; SANDY SPENCER and PETER WEBB,

Defendants-Appellees.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, published at 771 F.2d 424; the Tenth Circuit's order modifying such opinion; and the opinion of the United States District Court for the District of Colorado, published at 548 F.Supp. 248, are set forth in the Appendix.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Eighth Circuit Court of Appeals sitting by designation for the Tenth Circuit Court of Appeals entered its judgment on August 22, 1985. On September 20, 1985, Petitioner J.C. Tyus filed a Petition for Rehearing En Banc. On November 29, 1985, the court below denied Tyus' Petition. Petitioner invokes 28 U.S.C. §1254(1) as the jurisdictional basis of this Court to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution: SECTION. 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1981: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1983: "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985(3): "If two or more persons in any State or Territory conspire or go in disguise in the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection under the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engage therein due, or cause to be done, any act in furtherance of the object of such conspiracy, whereby

another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C. §1986: "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action of the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

STATEMENT OF THE CASE

Respondent, Francisco Eugenio Martinez, filed a Complaint in the District Court for the City and County of Denver, State of Colorado, which Complaint was timely removed to the U.S. District Court for the District of Colorado by Petitioner J.C. Tyus among others. That part of the one hundred eighty-nine paragraph Complaint pertinent to Petitioner is as follows:

> Paragraph 101. At the aforesaid hotel room meeting on January 29, 1981, defendant Tyus, a witness for the

> prosecution and a City of Denver Police officer, conspired with defendant [Judge] Winner and others to create a mistrial by offering to make an improper and prejudicial statement, in front of the jury, in his testimony, said proffered statement having previously been ruled inadmissible.
>
> Paragraph 102. Said offer to commit an improper act was due to defendant Tyus' bias, prejudice, dislike and distaste for plaintiff as a Mexicano and as a person who asserted the rights of Mexicanos and others.
>
> Paragraph 103. Defendants Tyus and Nicoletti conspired with defendant Winner, acting under color of law, to create and accept a mistrial for the purpose of depriving plaintiff of his constitutional rights.

Respondent did not allege that Petitioner actually gave such testimony to cause a mistrial, or that the alleged conspiracy involving Petitioner was furthered by anyone. In fact, the court below found that Petitioner did not give the alleged improper and prejudicial testimony and that the mistrial was declared "for quite different reasons." Appendix B at B-25.

Respondent alleged claims under 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988 arising from this alleged conspiracy between Petitioner and Judge Winner. Respondent invoked the rights and privileges embodied in the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution. The district court dismissed the entire Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6), with leave to file an amended complaint on the state tort claims. Respondent, however, stood on his original complaint and appealed the dismissal to the Tenth Circuit Court of Appeals. Because the matter involved alleged improprieties of the presiding district court judge, the Tenth Circuit recused itself and judges from the Eighth Circuit Court of Appeals sat by designation.

The Court of Appeals reversed the District Court by

holding that the conspiracy claim against Petitioner J.C. Tyus was properly stated under 42 U.S.C. §§1981, 1983, 1985(3), 1986, and the Fourteenth Amendment but affirmed the dismissal of the claim under 42 U.S.C. §1985(2). Petitioner obtained a fifteen day enlargement of time in which to file a Petition for Rehearing En Banc. Petitioner filed the Petition for Rehearing on September 20, 1985. The Court of Appeals denied Tyus' Petition on November 29, 1985. Such actions of the Court of Appeals are the basis for the within petition.

On December 10, 1985, Respondent's counsel filed a Motion to Withdraw from this action stating that Respondent had advised his counsel that Respondent "does not intend to continue the prosecution of this matter nor cooperate in any proceeding by counsel." Such motion has not been granted to date, nor has Respondent made any attempt to dismiss his claims against Petitioner.

ARGUMENT

It is respectfully submitted that the Court of Appeals erroneously reversed the trial court's dismissal of Respondent's claims against Petitioner. This error arises from the Court of Appeal's unprecedented finding that conspiracy claims under the civil rights statute could be sustained notwithstanding the absence of allegations that such conspiracy was consummated or that it injured Plaintiff. As the court below noted: "... Officer Tyus did not actually give the improper and prejudicial testimony that he allegedly offered, and... the mistrial was, in the event, declared for quite different reasons. It may be difficult, therefore, for [Respondent] to prove any damages as a result of Officer Tyus' actions, but we think he has a right to try, and, in the event, declaratory or injunctive relief to vindicate [Respondent's] constitutional rights might be appropriate." Appendix B at B-25.

This holding principally raises two issues of national importance and of conflict between circuits: (1) whether the right to be free from offered, but unconsummated, actions

regarding a person's criminal trial constitutes a constitutionally protected right; and (2) whether a conspiracy involving a mere offer to cause a purported constitutional injury, where no act is alleged to have been taken in furtherance of the conspiracy, and where there is no injury in fact, is actionable under the federal civil rights statutes.

It is well settled that a civil rights claim can be sustained only if one is *denied* "rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Baker v. McCollan*, 443 U.S. 137, 149 (1979). While Respondent has alleged that Petitioner's actions deprived Respondent of his "constitutional and civil rights," these rights were not identified in the Complaint. As stated by this Court, "it is necessary to isolate the *precise* constitutional violations" alleged by a civil rights Plaintiff. *Baker v. McCollan*, 443 U.S. at 149 (emphasis added).

The Complaint reflects no injury caused by Petitioner, given the fact that Respondent was granted a mistrial for reasons unrelated to Petitioner's actions, and given the fact that the government was precluded from reprosecution. *See United States v. Martinez*, 667 F.2d 886, 888 (10th Cir. 1981) (the mistrial was granted because two jurors in the criminal action complained of spectators wearing "Free Kiko" (Respondent's name) t-shirts and complained of a person at defense table wearing sunglasses). *See* Appendix C at C-2. It is entirely unclear what constitutional right, if any, was allegedly deprived by Petitioner, whose actions took place after the actions which formed the basis of the mistrial that was declared. The court below, while finding that the actual mistrial stated a basis for an alleged deprivation of Respondent's First and Fifth Amendment rights, Appendix B at B-18, made clear Petitioner's alleged conspiracy was not the cause. Appendix B at B-25. Even assuming *arguendo* actions causing a mistrial of a criminal matter contravene a constitutional right of the criminal defendant, a constitutional right is clearly not involved in the mere *offer* to cause a mistrial. Finally, it is unclear that the Fifth Amendment applies to Petitioner, a state actor, as the Tenth

Circuit has held. If the Fifth Amendment does apply to a state actor, the "due process" clause of the Fifth Amendment limits the remedy to the criminal dismissal, as was accorded in this case, thus precluding an additional civil recovery under the federal civil rights laws. *Cf. Parratt v. Taylor*, 451 U.S. 527 (1981); *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979).

Furthermore, in the absence of an actual violation of any "clearly established constitutional right," dismissal based on qualified immunity is mandated prior to requiring a governmental defendant to go through the expense, time and inconvenience of trial. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). An official is immune from the *expense of suit* if under an objective test the alleged "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 319. The mere offer to violate, without actually violating, a purported constitutional right is protected conduct recognized under *Harlow*, because no reasonable person would know that the mere offer to cause a mistrial, which was not accepted and which was not performed, would violate a constitutional right.

The Court of Appeals, while recognizing that Petitioner could assert a qualified immunity defense, erroneously concluded that this defense raised a question of fact. Appendix B at B-25. *Harlow* specifically removed such factual questions when this Court set forth an objective test to allow for pretrial determination of the qualified immunity defense. 457 U.S. at 808. Petitioner's constitutional right to be free from a non-fulfilled, unaccepted offer to cause a mistrial, which presents solely a legal question, is not clearly established, if it exists at all. Therefore, Petitioner has qualified immunity under *Harlow*.

Even where an officer commits perjury, he is absolutely immune. *Brisoe v. Lahue*, 460 U.S. 325 (1983). It would be incongruous to hold a police officer subject to suit for offering to testify in a manner that would cause a mistrial yet release him from suit if he actually did testify falsely.

Furthermore, this Court considered the issue of causation under 42 U.S.C. §1983 in *Martinez v. State of California*, 444 U.S. 277, 285 (1980), when it ruled that petitioner's decedent's death was too remote a consequence of the parole officers' decision to release a prisoner to hold the officers responsible under the federal civil rights law. No court, except for the decision below, has found that the mere offer to deprive someone of a purported constitutional right, without actually causing the violation of any such right, constitutes a basis for a civil rights claim.

Finally, accepting as true the allegations in the Complaint, Respondent has not alleged a conspiracy cognizable under 42 U.S.C. §§1981 or 1983 or the Fourteenth Amendment. Although the Colorado Supreme Court, *see Espinoza v. O'Dell*, 633 P.2d 455, 468 (Colo. 1981), and the Tenth Circuit Court of Appeals have decided that Respondent may establish the *causational* elements necessary for a §1983 action by showing conspiratorial conduct, this Court has never decided the question. This Court has decided only the related question of whether conspiratorial conduct may establish the element of "under color of state law" to meet §1983 requirements. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

Respectfully submitted.

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APPENDIX

A. Tenth Circuit Court of Appeals, modification and denial of Petioner's Petition for Rehearing En Banc. Filed November 29, 1985.

B. Tenth Circuit Court of Appeals, original opinion. Filed August 22, 1985.

C. United States District Court for the District of Colorado, memorandum opinion. Filed July 30, 1982.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82-2110

FRANCISCO EUGENIO MARTINEZ,

Plaintiff-Appellant,

v.

FRED M. WINNER, Chief Judge of the United States District Court for the District of Colorado, individually and in his official capacity; JOSEPH M. DOLAN, United States Attorney for the District of Colorado, individually and in his official capacity; SUSAN ROBERTS, Assistant United States Attorney, individually and in her official capacity; JOHN R. BARKSDALE, Assistant United States Attorney, individually and in his official capacity; DAN CHRISTOPHER, Assistant United States Attorney, individually and in his official capacity; JAN CHAPMAN, Assistant United States Attorney, individually and in her official capacity; UNITED STATES DEPARTMENT OF JUSTICE, a governmental entity; FEDERAL BUREAU OF INVESTIGATION, a governmental entity; "JOHN DOE" and other unnamed and unknown agents in the Denver Office of the Federal Bureau of Investigation, individually and in their official capacities; MATT DUNN, Deputy United States Marshal, individually and in his official capacity; PEYTON BAER, Deputy United States Marshal, individually and in his official capacity; LES WEISENHORN, Deputy United States Marshal, individually and in his official capacity; CITY AND COUNTY OF DENVER, a governmental entity; DALE A. TOOLEY, District Attorney for the City and County of Denver, individually and in his official capacity; CASTELAR GARCIA, JR., Deputy District Attorney, individually and in his official capacity; CITY OF DENVER POLICE DEPARTMENT, a governmental entity; ARTHUR DILL, Chief of Police, individually and in

his official capacity; ROBERT SHAUGHNESSY, Chief, City of Denver Police Department, individually and in his official capacity; ROBERT NICOLETTI, Captain, Denver Police Department, individually and in his official capacity; J.C. TYUS, Detective, Denver Police Department; "JOHN DOES," and other unnamed and unknown agents of the Denver Police Department; SANDY SPENCER and PETER WEBB,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 82-BJ-199)

Submitted: November 18, 1985

Filed: November 29, 1985

Before LAY,* Chief Judge, BRIGHT* and ARNOLD,* Circuit Judges.

ARNOLD, Circuit Judge.

On August 22, 1985, we filed our opinion in this case, affirming in part and reversing and remanding for further proceedings in part. *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985). Three petitions for rehearing are now before us: One filed by J.C. Tyus, one filed by the United States Attorney for the District of Colorado and the Federal Bureau of Investigation, and one filed by Jan Chapman.

The petitions for rehearing filed by J.C. Tyus, the United States Attorney for the District of Colorado, and the Federal Bureau of Investigation are denied.[1]

* The Honorable Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit, and the Honorable Myron H. Bright and the Honorable Richard S. Arnold, United States Circuit Judges for the Eighth Circuit, sitting by designation.

[1] Mr. Tyus's petition is captioned "A Petition for Rehearing en Banc." To

The petition for rehearing of Jan Chapman is granted. On reconsideration, the Court vacates and sets aside that portion of its prior opinion reversing the judgment of dismissal of the complaint as to her. A new judgment will be entered affirming the District Court's dismissal with prejudice of the complaint as to Jan Chapman.

The complaint, which we must take as true for present purposes, alleged, ¶ 27, I R. 25, that the defendant Chapman, an Assistant United States Attorney, filed an affidavit concealing and misrepresenting what had happened in Martinez's trial before Judge Winner, "for the purpose of defeating plaintiff's lawful efforts to claim a mistrial." We understood this allegation to refer to a submission made by Chapman "in some sort of bar disciplinary proceeding . . . ." 771 F.2d at 438. Such a submission, we held, was outside the scope of prosecutorial immunity, because it was "not part of the presentation of the government's case nor of the judicial process," and did "not involve the role of the prosecutors as advocates." *Ibid.* The affidavit was instead, we believed, filed "for the personal benefit of . . . [Chapman] to cover up [her] wrongdoings." *Ibid.*

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the extent that rehearing en banc was requested, his petition was submitted to all of the judges of this Court in regular active service, and an order was entered on October 10, 1985, in which they recused themselves from any consideration of this petition for rehearing en banc. The order read as follows:

> The court has received a petition for rehearing en banc filed September 20, 1985 by appellee J.C. Tyus. All of the active judges of this court earlier recused themselves and the Chief Justice of the United States on March 6, 1985 designated Chief Judge Lay and Circuit Judges Bright and Arnold of the Eighth Circuit "to perform duties as a panel of the Tenth Circuit in re: Francisco Eugenio Martinez v. Fred M. Winner, et al., No. 82-2110, and all judicial matters in connection therewith . . ."
>
> The active circuit judges of this court have determined that they should, and do hereby, recuse themselves further from any consideration of the petition for rehearing en banc filed by appellee Tyus. We note that Rule 21 of the Rules of Court of the Tenth Circuit adopted November 13, 1972 provides in part that a hearing or "rehearing en banc may be ordered by a majority of the judges of this

Chapman's petition for rehearing, which is not contradicted in any material respect by Martinez's response to it, makes it clear that we were mistaken in our reading of the allegation made against her. In fact, the only statement to which ¶127 of the complaint could be referring was filed by Ms. Chapman in the criminal prosecution itself, after the mistrial had been declared, in response to filings made by the defendant Martinez. The statements made in this filing may or may not be true, but they were made by a prosecutor in the course of her duties as such, and they are therefore entitled to absolute immunity for the same reasons given in our previous opinion with respect to the other alleged misdoings of the federal-prosecutor defendants. See 771 F.2d at 436-41. Nor is there any reason to hold Ms. Chapman in as a defendant with respect to plaintiff's claims for declaratory and injunctive relief. As we previously observed, "[a]ny injunctive relief to which Martinez is entitled will be fully effective if directed against the current United States Attorney, who of course controls and supervises all of the Assistants." *Id.* at 439 n.5.

Accordingly, our previous opinion is modified with respect to the defendant Jan Chapman. As to her, the judgment dismissing the complaint with prejudice in its entirety is affirmed. In all other respects rehearing is denied, and our previous opinion reaffirmed.

It is so ordered.

A true copy.

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court who are in regular active service and who are not disqualified in the particular case or controversy . . ." We observe further that in similar circumstances, in *United States v. Isaacs*, 493 F.2d 1124, 1168 (7th Cir. 1974), *cert. denied*, 417 U.S. 976, the active judges of the Seventh Circuit did not act upon a petition for rehearing en banc and recused themselves and the matter was determined by the panel designated by the Chief Justice.

Accordingly, this order of recusal is entered by all the active circuit judges of this court.

The panel of designated judges has also considered Mr. Tyus's petition, and, as indicated in text, it is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 82-2110

FRANCISCO EUGENIO MARTINEZ,

Plaintiff-Appellant,

v.

FRED M. WINNER, et al.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 82-BJ-199)

Submitted: March 28, 1985

Filed: August 22, 1985

771 F.2d 424

Before LAY,* Chief Judge, BRIGHT* and ARNOLD,* Circuit Judges.

ARNOLD, Circuit Judge.

* The Honorable Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit, and the Honorable Myron H. Bright and the Honorable Richard S. Arnold, United States Circuit Judges for the Eighth Circuit, sitting by designation.

Francisco Eugenio Martinez, known as "Kiko," appeals from the District Court's dismissal of his civil-rights complaint. Martinez claims the defendants deprived him of his civil and constitutional rights, conspired to "get Kiko," and tried to "railroad" him into prison on unsubstantiated criminal charges. He asserts claims based on 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, unspecified sections of the Constitution of the State of Colorado, common-law tort actions including false arrest, false imprisonment, malicious abuse of process, harassment, gross misconduct, outrageous conduct, and negligence, and violations of the Code of Judicial Conduct and the Code of Professional Responsibility for lawyers. He seeks damages, an injunction, and declaratory relief. The principal defendant is Fred M. Winner, at all relevant times Chief Judge of the United States District Court for the District of Colorado, who presided over plaintiff's trial in 1981 for mailing a letter bomb.

The District Court held that Judge Winner and the federal prosecutors were entitled to immunity from liability for damages for their acts, and that declaratory and injunctive relief were not available in this case. The judge and the federal prosecutors were dismissed from the case, as no relief could be granted against them. The causes of action under 42 U.S.C. §§1981, 1985, 1986, and 1988 were dismissed as either inapplicable or because no claim was stated under them. The claims against the remaining defendants were dismissed under Fed. R. Civ. P. 8(a) and 12(b)(6).[1] Martinez was given 20 days to correct the deficiencies in the complaint, but he chose to stand on the complaint as filed. The dismissal of his complaint was therefore with prejudice.

We hold that Judge Winner is absolutely immune from any claim for damages, and that injunctive and declaratory

[1] The causes of action arising under state law were dismissed without prejudice to plaintiff's right to assert them in the Colorado state courts.

relief against him would serve no purpose. He has left office. As to the other defendants, we affirm in part and reverse in part.

I.

Martinez's complaint arises out of criminal actions against him in both state and federal courts for the possession and mailing of three letter bombs. In 1973 the United States Attorney's office for the District of Colorado decided to prosecute Martinez for possession of unregistered explosives and the sending of explosives through the United States mails. Martinez fled the jurisdiction and did not return until 1980, when he was arrested by federal authorities. The charges in the indictment were split: each of three mail-bomb incidents was tried separately. In 1980 the Denver District Attorney's office also charged Martinez with crimes involving bombing attempts. These state charges were later dismissed upon motion of the prosecution.

During the first trial highly improper conduct occurred. The facts are summarized in this Court's decision in *United States v. Martinez*, 667 F.2d 886, 887-88 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982). In stating the facts we draw also on the complaint, which we must take as true for present purposes. During the middle of the first trial the presiding judge, Judge Winner, held a secret meeting in his hotel room. Present at the meeting were two Assistant United States Attorneys, three Deputy United States Marshals, the Judge's second secretary, who was also a deputy clerk of the District Court, and some witnesses for the prosecution. Neither defendant nor his counsel were notified about this meeting. Judge Winner expressed apprehension that the jury was being intimidated by spectators, and that Martinez might be acquitted. He wanted hidden cameras installed to record the intimidation, which he felt was an obstruction of justice. It was agreed at the meeting that a mistrial would be declared, so as to give the government another chance to convict Martinez before another jury. Judge Winner's thought was that the

prosecutors should not move for a mistrial until after the defense had presented its case, so that the government could be informed as to defense strategies. The judge further stated that he could provoke counsel for defendant into requesting a mistrial. One witness, also a defendant here, Officer Tyus of the City of Denver Police Department, suggested that he could cause a mistrial by giving improper and prejudicial testimony that had previously been ruled inadmissible. The reason given for not inviting defendant's counsel to the meeting was the court's suspicion (unverified on the record) that one of defendant's counsel might be involved in the supposed conspiracy to intimidate the jury.

The next morning, the government announced that it no longer opposed the motion for mistrial that had been made the previous day by defendant and denied. Defense counsel asked why the government had changed its position, and, according to the complaint, an Assistant United States Attorney replied, falsely, that the government was willing to consent to a mistrial because one of the jurors had become ill. The defense then joined in the motion, and a mistrial was declared. Judge Winner and the government had apparently thought it important to induce defense counsel to join in the mistrial motion, so as to avoid a later claim of double jeopardy.

In *United States v. Martinez*, *supra*, we held that the government's misrepresentation of its grounds for seeking a mistrial and its failure to inform the defense of the hotel-room meeting barred retrial as to the first letter-bomb mailing under the Double Jeopardy Clause. *Id.* at 889-90. Martinez was then tried for a second alleged mailing of a letter bomb, and this time he was acquitted by the jury. The United States then prosecuted him for the third alleged letter-bomb mailing. We held that this prosecution was not barred by the government's apparently negligent destruction of physical evidence, but that the prosecution could not, in the course of the third trial, introduce evidence of the first two alleged bombings as similar crimes or acts. *United States v. Martinez*, 744 F.2d 76, 80 (10th Cir. 1984). On remand, the District Court dismissed the third charge on motion of the government, which apparently believed that it

lacked sufficient evidence to convict, in view of our holding ruling out evidence of the first two bombings. *United States v. Martinez*, No. 73-CR-414 (D. Colo. Nov. 30, 1984) (order dismissing remaining counts).

We now summarize the remaining allegations of the complaint before us on this appeal. (Additional details will be given as plaintiff's theories against the various defendants are discussed.) Martinez alleges that there was a "get Kiko" conspiracy on the part of state and federal law-enforcement agencies, Judge Winner, and others. Plaintiff, a lawyer, says that he was actively using his legal skills to promote the assertion of rights by Mexicanos and other "oppressed" national minorities, including Native Americans. As a result of these activities, and because he himself was a Mexicano, he alleges that law-enforcement agencies conspired to harass and oppress his political and social activism. He claims they carried out unlawful surveillance and investigations, kept a dossier on him, received and passed on information, and issued malicious and inflammatory press releases. He says that false charges were brought against him, charges known to the prosecution to be false, and that the defendants tried to "railroad" him to jail. The "railroading" charge has particular reference to the hotel-room meeting, the details of which we have already described. As a result of these activities, Martinez alleges that numerous constitutional violations occurred and that many common-law torts were committed against him.

Because this appeal comes to us from a Rule 12(b)(6) dismissal for failure to state a claim, we take the well-pleaded allegations of the complaint as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). And under the liberal pleading rules set out in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (footnote omitted).

II.

Martinez's complaint seeks to allege many claims against many defendants. The clearest way to describe these claims and our disposition of them, we think, is to take each of the defendants or groups of defendants in turn. We will begin with Judge Winner, because the question of his judicial immunity seems to be the most important issue in the case, or, at any rate, the issue on which the plaintiff-appellant spends most of the pages of his brief.

In *Stump v. Sparkman*, 435 U.S. 349, 359 (1978), the Supreme Court stated that a judge is entitled to judicial immunity if he has not acted in clear absence of all jurisdiction and if the act was a judicial one. An act is judicial if it is a function normally performed by a judge and the parties dealt with the judge in his judicial capacity. *Id.* at 362. A judge is entitled to immunity even if he acted with partiality, maliciously, or corruptly. *Bradley v. Fisher*, 13 Wall. 335, 348 (1871).

Many of Martinez's arguments against the judge are based on the theory that the acts were ministerial or administrative and therefore nonjudicial. However, an act may be administrative or ministerial for some purposes and still be a "judicial" act for purposes of immunity from liability for damages. *Rheuark v. Shaw*, 628 F.2d 297, 304-05 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). Each act must be examined to determine if it was a function normally performed by a judge and if the parties were dealing with the judge in his judicial capacity. No question is raised in this case regarding Judge Winner's jurisdiction.

The complaint states that Judge Winner assigned himself, in contravention of local practice and rules, to preside at the Martinez criminal trial, for the purpose of insuring a conviction. Cases filed in federal district courts are to be divided among the judges as provided by the rules and orders of the court. The chief judge is responsible for the observance of such rules and orders and assigns the cases when the rules and orders make no provision. 28 U.S.C. §137 (1982). Martinez does not dispute that Judge Winner,

as chief judge, had the responsibility to insure that the rules are followed, but he argues that this is an administrative duty, usually handled by deputy clerks. Although it is an "administrative" act, in the sense that it does not concern the decision who shall win a case, the assignment of cases is still a judicial function in the sense that it directly concerns the case-deciding process, and by statute it is the responsibility of the chief judge, Judge Winner in this case. It was within the expectation of the parties that the chief judge would be responsible for the assignment of cases. That Judge Winner may have acted improperly in assigning a case to himself is irrelevant to the issue of judicial immunity. The assignment of a case to himself was a judicial act for which Judge Winner is entitled to judicial immunity.

Martinez next argues that Judge Winner created a tense courtroom atmosphere for the purpose of causing jury hostility to him. He alleges that Judge Winner assigned deputy marshals who were prejudiced against Martinez, appointed more security personnel than necessary, required inspection of items brought into the courtroom, and required personal searches. Martinez argues that courtroom security arrangements are an administrative act, and thus that Judge Winner is not entitled to absolute immunity. On the contrary, it is the judge's responsibility to exercise control over the courtroom and take security precautions during a trial. In *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966), the Court stated: "The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court." It is a judge's duty to order some type of precaution if he or she believes there might be some sort of trouble. Usually this sort of thing is delegated to the United States Marshal or to court security officers, but the judge remains ultimately responsible, and this responsibility directly concerns his duty to see that cases are decided in a peaceful and dignified atmosphere.

Judge Winner suggested at the hotel-room meeting that a hidden camera be installed to observe threats which he believed were being made against the jury. Martinez

argues that Judge Winner's suggestion was part of a conspiracy to prosecute him, his lawyers, supporters, and spectators for obstruction of justice, and that Judge Winner gathered evidence, directed police and FBI activities, and tried to involve the prosecuting attorneys in his camera "scheme." Suggesting the installation of hidden cameras to observe possible threats to, or intimidation of, the jury falls within a judge's responsibility to maintain order and security in the courtroom. If the judge feels a jury is being intimidated by spectators, it is his responsibility to notify the proper law enforcement agencies and have the possible crime investigated. A judge is not only entitled but also has a duty to take all lawful measures reasonably necessary to prevent the occurrence of a crime in his courtroom. Cases holding judges are not entitled to immunity for the independent investigation of crimes occurring outside their courtrooms are quite different. See *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir.), *cert. denied*, 449 U.S. 1028 (1980). Judge Winner is entitled to judicial immunity for these security measures.

A judge who allegedly predetermines a case is still protected by judicial immunity. *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984); *Lopez v. Vanderwater*, 620 F.2d at 1234; *but see Rankin v. Howard*, 633 F.2d 844, 847 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). To hold that a judge who is charged with having made a predetermination of guilt is not entitled to absolute immunity would make ineffective the whole doctrine of judicial immunity. Every dissatisfied loser could sue the judge on this basis. "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away." *Bradley v. Fisher*, 13 Wall. at 348. Even if Judge Winner made a predetermination that Martinez was guilty, he is still entitled to judicial immunity.

The complaint also states that Judge Winner wrote to the Department of Justice accusing Martinez of being a

catalyst for bringing together four terrorist groups, and charging that he was obstructing justice and was involved in bombings and riots. Copies of the letter were then allegedly sent to other members of the federal bench, to defendant Shaughnessy, Chief of the Police Department of the City of Denver, to unspecified others, and to the *Denver Post*, which published portions of the letter. Martinez also alleges Judge Winner granted an interview to defendant Webb, a television reporter, to induce him to publish the same accusations.

There is no question that Judge Winner is entitled to immunity for writing the letter to the Justice Department and sending copies to the other law-enforcement officials. The letter referred to the trial and Judge Winner's belief that the jury had been intimidated. As stated above, Judge Winner had a duty to notify the proper authorities if he felt a crime was being committed in his courtroom. As to sending the letter to the *Denver Post*, the complaint alleges only that the letter was sent, not that the judge sent it. Finally, although it is usually inappropriate for judges to give statements to the press about pending cases, here the statement simply repeated the contents of a letter sent to law-enforcement authorities. If, as we have held, the sending of the letter is itself within the judicial immunity, we do not think that repeating the letter's contents to newspeople is so far nonjudicial as to forfeit that immunity.

Finally, Martinez alleges that Judge Winner received information about him from the FBI and the Denver Police Department. The complaint does not claim that Judge Winner solicited the information. Moreover, the mere receipt of information violates no law and is simply no basis for any action.

We conclude that Judge Winner is entitled to absolute judicial immunity from the claims for damages alleged against him in the complaint. As is always the case when a defense of immunity is upheld, some wrongs may go unredressed as a result of this holding. Indeed, we have already held, *United States v. Martinez, supra*, 667 F.2d 886,

that the hotel-room meeting and subsequent courtroom proceedings were a gross impropriety. The premise of the doctrine of absolute judicial immunity, however, is that it is more tolerable for a few wrongs to go unredressed than for the judiciary to be continuously harassed by suits brought by disappointed litigants. That most of these cases would probably be dismissed on the merits, either on motion for summary judgment or after trial on the merits, is not a complete answer to the dangers posed by this kind of harassment, for being forced to litigate such matters is a significant personal burden, inevitably distracting the defendant judges from their main duty of deciding cases. The public must look to other remedies, including impeachment and disciplinary proceedings before the judicial council of the circuit involved, for such transgressions. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.), *cert. denied*, 339 U.S. 949 (1950).

The complaint also seeks an injunction and a declaratory judgment against Judge Winner. The Supreme Court has held that judges' absolute immunity does not bar these kinds of relief. *Pulliam v. Allen*, 104 S. Ct. 1970 (1984). Here, however, Judge Winner has resigned from office, so the request for injunctive relief against him is moot. As for a declaratory judgment, Martinez has already obtained it, in substance, in the form of our opinion in *United States v. Martinez*, *supra*. The District Court's decision to dismiss the complaint in its entirety with prejudice as to Judge Winner will be affirmed.

III.

We next discuss, as a group, the federal-prosecutor defendants. They are Joseph M. Dolan, United States Attorney for the District of Colorado, and four Assistant United States Attorneys for the same District, Susan Roberts, John R. Barksdale, Dan Christopher, and Jan Chapman. (The official positions given for each of these defendants are those held at the time of the acts alleged in the complaint.) The complaint alleges that these federal defendants, in common with all other defendants, were

biased and prejudiced against "Mexicano, American Indian, Black and other national minorities," I R.13-14,[2] and held political and social views in opposition to them and to the assertion of their rights. In or about 1980, it is alleged, the defendant Dolan determined to continue prosecuting the federal indictment that had been returned against Martinez in 1973. This prosecution was based on racial criteria, and its purpose was harassment. I R.16, complaint ¶53. Defendants Barksdale and Christopher were present at the hotel-room meeting on January 29, 1981, the third day of the trial for the first alleged letter-bomb mailing. On the next day, January 30, 1981, Judge Winner met with defendant Roberts, Barksdale's and Christopher's supervisor, and renewed his offer to grant a mistrial on demand of the government. I R.23, complaint ¶98. On the same day, Barksdale and Christopher, as detailed above, agreed to the motion for mistrial that defendant had unsuccessfully made the day before, and gave a false reason for the change in the government's position. Roberts, Barksdale, and Christopher, after consultation with and on the instructions of Dolan, failed to inform the plaintiff and his attorneys of the hotel-room meeting, apparently for the purpose of depriving Martinez of a potent argument in support of his claim that retrial would be barred by double jeopardy. I R.22, complaint ¶109. And finally, on or about March 17, 1981, defendant Chapman submitted an affidavit concealing and misrepresenting what had happened, all "for the purpose of defeating plaintiff's lawful efforts to claim a mistrial." I R.25, complaint ¶127.

The District Court dismissed these allegations. It held that the federal-prosecutor defendants were entitled to absolute prosecutorial immunity from liability for damages, and that injunctive and declaratory relief were not available, primarily because it thought no practical form of injunctive relief could be conceived of. In addition, the District Court believed that many of these allegations failed to state a claim. The declaration of a mistrial simply gave Martinez relief that he and his own lawyers had been

[2] This reference is to pages 13-14 of Volume 1 of the record.

consistently seeking throughout the first trial, and this first charge was ultimately dismissed with prejudice on double-jeopardy grounds.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court discussed the applicability of prosecutorial immunity to §1983 actions and reviewed the common-law immunity of prosecutors. The Court noted that the purpose of prosecutorial immunity was to prevent unfounded and harassing litigation that might unduly influence the exercise of independent judgment. *Id.* at 423. The Court held that a prosecutor's activities intimately associated with the judicial phase of the criminal process were entitled to absolute immunity. The Court reserved judgment "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Id.* at 430-31. "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from civil suit for damages under §1983." *Id.* at 431. The same principles apply to actions alleging unconstitutional conduct by federal prosecutors. The main allegations concern the prosecutors' meetings with Judge Winner and the confession of mistrial.

Plotting with the court to declare a mistrial for the government's convenience is a violation of a defendant's right to a fair trial, guaranteed by the Due Process Clause of the Fifth Amendment. However, the meetings with the judge and the confession of mistrial fall within the scope of prosecutorial immunity. See *Kostal v. Stoner*, 292 F.2d 492, 493 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1962) (prosecutor allegedly conspired with judge to deprive plaintiff of fair trial), cited in *Imbler*, 424 U.S. at 420 n.16. Although it was grossly improper, the meeting of the judge and prosecutors to discuss the government's strategy was part of the judicial phase of the criminal process and concerned the presentation of the government's case. Thus, the prosecutors are entitled to immunity for these acts.

The next set of claims against the prosecutors concern allegations that Dolan and his assistants indicted and

prosecuted Martinez on charges that they knew or should have known were false. Martinez further argues that the prosecutors failed to make any independent inquiry or investigation regarding the charges but instead relied on information supplied to them by the Denver Police Department and the District Attorney for the City and County of Denver.

The prosecutors are clearly entitled to immunity for initiating the prosecution. *Imbler*, 424 U.S. at 431. Whether the charges were false and whether the prosecutors knew they were false is irrelevant. The allegation that the prosecutors failed to make an independent investigation also falls within the scope of prosecutorial immunity. See *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979); *Halpern v. City of New Haven*, 489 F. Supp. 841, 843 (D. Conn. 1980). Martinez is not arguing that the federal prosecutors committed some specific improper act during the investigation of his case. Rather, he challenges the basis upon which the prosecutors decided to indict and prosecute him, i.e., that they relied on other law-enforcement agencies' information. A prosecutor's exercise of discretion in deciding whether information is sufficient to support an indictment, and whether its source is credible, concerns the judicial phase of the criminal process. Furthermore, we know of no legal duty which requires the U.S. Attorney's office to make an independent investigation, and Martinez cites no support for his allegation that it is required to do so.

Finally, Martinez alleges that the prosecutors concealed, lied, misrepresented, and refused to reveal the reason for the mistrial and the improper acts of Judge Winner. In particular, Martinez alleges that Christopher and Barksdale gave a false reason when requested by Martinez's counsel to state why they requested a mistrial, that Barksdale, Christopher, and Roberts, at the direction of Dolan, their supervisor, failed to inform Martinez about the hotel-room meeting and what occurred there, and that Chapman submitted a false affidavit, apparently in some sort of bar disciplinary proceeding, concealing and misrepresenting the violation of Martinez's rights and lying about the conspiracy.

The failure of the prosecutors to disclose that the meeting occurred, although improper, is within the scope of prosecutorial immunity. *Cf. Hilliard v. Williams*, 540 F.2d 220 (6th Cir. 1976) (prosecutors entitled to immunity from damages for failure to reveal evidence favorable to defendant). However, lying and submitting a false affidavit after the trial had been concluded are not within the scope of prosecutorial immunity. These acts were not part of the presentation of the government's case nor of the judicial process. They do not involve the role of the prosecutors as advocates. They are instead actions taken for the personal benefit of the prosecutors to cover up their wrong-doings. Although prosecutors are entitled to immunity for wrongs they may commit in the judicial process, in this case, the involvement in the hotel-room meeting and the confession of mistrial, they are not entitled to immunity for action taken to cover up these wrongs in order to avoid any possible personal liability. We hold that the alleged lying and false affidavit are outside the scope of prosecutorial immunity, and that Chapman is not entitled to immunity for these acts.[3] See *Ryland v. Shapiro*, 708 F.2d 967, 975 (5th Cir. 1983) (falsifying death certificate and covering up murder are actions outside the role of prosecutors); *Briggs v. Goodwin*, 569 F.2d 10, 13-25 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (special prosecutor conducting grand jury investigation lied to the court when asked if any informants were among the parties subpoenaed; *held*, that prosecutor was not entitled to quasi-judicial immunity, because he was not acting as an advocate, and because his role at the time was investigative).

In sum, the prosecutors are entitled to immunity for initiating the prosecution, meeting with the judge, and confessing mistrial, but Chapman is not entitled to prosecutorial immunity for allegedly lying and filing a false affidavit.[4] This immunity, however, extends only to liability

[3] The complaint, ¶ 127, I R.25, does not allege that any other defendant cooperated in the submission of this false affidavit.

[4] Whether plaintiff can prove that he was damaged by this affidavit, as distinct from the other wrongs allegedly committed by the federal-prosecutor defendants, is of course a separate question, to be pursued on remand.

for damages. Prosecutors may still be liable for declaratory and injunctive relief. See *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736-37 (1980). If we understand the facts correctly, none of the federal-prosecutor defendants is still in office, so injunctive relief against them would have no meaning. The defendant Doian, however, was sued both individually and in his official capacity, and his successor in office, on motion of plaintiff made in the District Court on remand, can be substituted as a party defendant. An injunction could then be entered (assuming plaintiff can prove his case) against the successor United States Attorney in his or her official capacity, the purpose of which would be to control and prevent future prosecutorial acts in violation of Martinez's constitutional rights.[5]

The District Court took the view that the claim for injunctive relief should be dismissed on its face because no possible injunctive relief could be suggested, and because there is no present threat of any proceedings against Martinez, all three letter-bomb prosecutions having now been concluded favorably to him. Either or both of these propositions may ultimately turn out to be well-founded, but we do not think that the difficulties of fashioning relief should result in the dismissal of a complaint at the pleading stage. If a sufficiently strong case is made, for example, an injunction could conceivably be fashioned that would prohibit the United States Attorney from investigating Martinez, or from using certain investigative techniques against him, without previous approval either from a court or from a higher official of the Department of Justice. Whether there is any current real threat that the improper activities complained of will be resumed, again, is an issue best left to factual development on remand. At the oral argument we were informed by counsel for Martinez that

[5] The other four federal-prosecutor defendants, Roberts, Barksdale, Christopher, and Chapman, were also sued both individually and in their official capacities, but no purpose would be served by substituting in their place any current Assistant United States Attorney for the District of Colorado. Any injunctive relief to which Martinez is entitled will be fully effective if directed against the current United States Attorney, who of course controls and supervises all of the Assistants.

four days after the filing of the reply brief in this appeal the government raided his home and charged him with using a false name in order to gain re-entry to the United States in 1980. He has apparently been indicted on this new charge in the District of Arizona. Whether these representations are true we cannot know on the present record, but they have not been contradicted by the government, and we are not sufficiently confident of what the government's future intentions with respect to Martinez might be to dismiss out of hand at this early stage of the case his claim for injunctive relief against the federal prosecutors. In addition, whether or not coercive relief in the form of damages or an injunction is or could be granted, the prosecutor defendants are not immune from declaratory relief, which might serve the important purpose of vindicating plaintiff's constitutional rights. Martinez's claims against the prosecutors extend beyond the mistrial issue, so our earlier opinion in *United States v. Martinez*, *supra*, 667 F.2d 886, does not fully meet the need for declaratory relief.

It remains to discuss whether the allegations of the complaint against the federal-prosecutor defendants state a claim. So far, we have held, with respect to most of these allegations, that the federal-prosecutor defendants are immune from claims for damages. We have also held that the immunity does not extend to injunctive or declaratory relief, and that these kinds of relief, depending on the facts developed on remand, may be available. The question whether the complaint states a claim under any of the constitutional provisions and statutes pleaded must also be discussed, because, if it does not, dismissal of the complaint must be affirmed without regard to our conclusion on any of the issues of immunity.

We believe that several of the statutes and constitutional provisions pleaded in the complaint are applicable. First, we address the alleged claim under 42 U.S.C. §1981. Reading the complaint as a whole, we conclude that it sufficiently alleges that Martinez was falsely arrested, prosecuted on unfounded charges, and denied a fair trial because of his race and national origin. Thus, he alleges that he has been denied the "full and equal

benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," and that he has been subjected to pains, punishments, and exactions greater than those imposed on white citizens, in violation of §1981. It should be recalled, in this connection, that the complaint alleges, I R.11, ¶2, that each of the defendants, including the federal-prosecutor defendants, violated the plaintiff's rights in part because of his race and national origin.

In addition, the complaint seeks to allege claims under 42 U.S.C. §1985(3) (conspiracy to deprive any person or class of persons of equal protection). The District Court interpreted the complaint as alleging two conspiracies, a hidden-camera conspiracy and a "railroading" conspiracy, which involved the government's concession that a mistrial should be granted. It dismissed the §1985(3) claim because Martinez failed to allege any facts in support of his theory that the conspiracy was motivated by racial discrimination, and because Martinez failed to allege that any other constitutional rights (in addition to the right to be free of racial discrimination) had been violated. We believe the District Court interpreted the conspiracy allegations of the complaint too narrowly, and that the hidden-camera and railroading claims were part of a larger conspiracy allegation. The complaint alleges that the defendants conspired against the plaintiff because he was Mexicano and was active in political and social activities in support of various minorities. This conspiracy allegation starts with the illegal surveillance and false charges and continues through the hotel-room meeting and confession of mistrial. So read, the complaint sufficiently alleges that plaintiff was harassed and oppressed in order to intimidate him from exercising his First Amendment rights of freedom of speech and expression, and that this harassment was based on at least two factors: racial antipathy and opposition to plaintiff's political and social opinions. This is a sufficient allegation of conspiracy under §1985(3).

We are mindful of the holding of *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971), that §1985(3) is not a general federal tort law, but requires that "there must

be some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.* at 102. Martinez is a member of a racial and national minority and clearly alleges that he has been conspired against because of his race, political and social beliefs, and activities on behalf of his own and other minorities. Because he is not alleging a purely politically motivated conspiracy, but also alleges that the defendants were motivated by racial discrimination, he avoids the issue left open by the Surpreme Court in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 103 S. Ct. 3352, 3359-60 (1983), as to whether §1985(3) covers wholly non-racial, politically motivated conspiracies.

To be sure, a claim of conspiracy under §1985(3) requires a deprivation of some right or privilege created by the Constitution or other provisions of federal law. "The rights, privileges, and immunities that §1985(3) vindicates must be found elsewhere . . ." 103 S. Ct. at 3358. Martinez has amply met this requirement. He alleges that his freedoms of speech and association and his right to a fair trial have been infringed for reasons of racial bias. Even without the allegation of racial bias, the complaint would sufficiently state a claim for violations of the First and Fifth Amendments, but the addition of the claim of racial bias brings into play §1985(3) as well.

The District Court took the view that because the prosecutions against Martinez ultimately came to nothing, he has no cause of action. A mistrial was declared in the first letter-bomb case, but Martinez himself had previously moved for a mistrial, so he actually got the very relief he had sought. We believe this approach is too narrow. Martinez alleges that he had been subjected to an unfounded prosecution, and that, because of a conspiracy to subvert the processes of justice, a conspiracy engaged in both by the trial court and by the government, he was subjected to the threat of a new prosecution. That the new prosecution ultimately failed does not mean that Martinez's rights were not violated. It means only that the damage he has suffered is not so great as it would be if he had also been unjustly

convicted, as well as being subjected to an unjustly managed criminal process.

In addition, defendants argue that no one is immune from investigation on criminal charges, and that it is the duty of the authorities to maintain surveillance of those suspected of crime. All this is true enough, but it misses the point of the complaint's allegations. If, for example, the police and prosecutors decided to go to every meeting of Methodists, take photographs and recordings, and otherwise maintain surveillance, in order to determine if the Methodists were plotting some kind of crime, and at the same time determined to avoid any such activities with respect to Baptists, no one could deny that the Methodists' constitutional rights were being infringed, and this would be true whether or not particular Methodists were actually committing crimes. Every citizen has a right to be free from investigation and prosecution because of his religious or political beliefs or race.

So here, the charge made by the complaint is that the defendants conducted surveillance of Martinez and his associates and prosecuted them because of racial prejudice against them, and because of disagreement with their political opinions. In our country, these cannot be sufficient bases for official action. The deprivation of these constitutional rights, if it can be proved, would entitle Martinez to nominal damages, if to no other form of relief. See *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . ." *Id.* at 266. *Carey* involved a §1983 claim, but the same reasoning applies to claims under §1985(3) and the Constitution itself.[6]

[6] The District Court also dismissed Martinez's conspiracy claim under §1985(2). The first clause of this section concerns obstruction of justice in the federal courts. See *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983). Martinez does not allege intimidation of a party, witness, or juror in a federal court, and therefore the District Court was correct, so far as the federal-prosecutor defendants are concerned, in dismissing his claim under §1985(2), clause 1.

Martinez has also pleaded a claim under 42 U.S.C. §1986. Under this statute, any person who has knowledge of a §1985 conspiracy and has the power to prevent or aid in preventing the commission of the conspiracy, and does not, may be liable to the party injured. Since we hold, with respect to the federal-prosecutor defendants, that Martinez's §1985(3) conspiracy cause of action is viable, his §1986 action also becomes viable, and it should not have been dismissed. The same is true of the §1983 claim. Federal officials ordinarily are not suable under §1983, which requires action under color of state law, but they may be liable under §1983 where, as here, they are charged with conspiring with state officers or employees.

In sum, we hold that all of the federal-prosecutor defendants, except the defendant Chapman, are entitled to absolute immunity from claims for damages. As to the claim for declaratory and injunctive relief, the dismissal of the complaint is reversed. The complaint states legally sufficient causes of action under §§1981, 1983, 1985(3), and 1986, and under the First Amendment and the Due Process Clause of the Fifth Amendment. The District Court's dismissal of the claim against the federal prosecutor defendants under §1985(2), clause 1, is affirmed.[7]

IV.

We next address the claims against federal defendants other than the judge and the prosecutors. First, the Department of Justice was properly dismissed as a named defendant, if for no other reason, because it is not a juridical entity separate from the United States or the individual officers and employees who direct and work for it. The same is true of the Federal Bureau of Investigation as a named defendant. The United States itself could have been named as a defendant, but it has not waived its sovereign immunity for constitutional torts as such. *Laswell v. Brown*, 683 F.2d

[7] We also affirm, as to all defendants, dismissal of the claims under the Fourth, Sixth, Eighth, Ninth, and Thirteenth Amendments. These provisions are either clearly inapposite, or else add nothing of substance to the theories that we have held are adequately pleaded.

261, 268 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983); *Birnbaum v. United States*, 588 F.2d 319, 327-28 (2d Cir. 1978). As noted by Justice Harlan in a concurring opinion, "[h]owever desirable a direct remedy against the government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971). The Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2679(a), is available as a remedy for certain torts committed by the United States, but plaintiff did not seek to plead a claim under this statute, nor can he do so now, because he has not preserved his rights by filing an administrative claim within the time limit provided.

The complaint does, however, name as defendants "John Doe and other unnamed and unknown agents in the Denver office of the Federal Bureau of Investigation." Plaintiff asserts that at the time he filed his complaint he was unable to name the agents that he believed had violated his rights. Discovery, it is said, could develop these persons' names. The complaint alleges that FBI personnel were involved in illegal surveillance of Martinez and in installing or attempting to install a wire-tap in the office of one of his lawyers. In the context of the complaint read as a whole, which alleges that all defendants were motivated by racial bias and by opposition to plaintiff's political and social opinions, we believe this allegation would state a claim if individual defendants could be named. As we have explained previously, police surveillance and other investigative techniques lawful in and of themselves become unlawful if employed against a particular race or nationality for reasons of bias and prejudice, or if employed with specific intent to suppress certain unpopular political opinions. On remand, after a reasonable period of time for discovery, plaintiff should be given an opportunity to amend his complaint to name the particular FBI agents who he believes have violated his rights.

Also named as defendants are three Deputy United States Marshals, Matt Dunn, Peyton Baer, and Les Weisenhorn. Even when read with the proper degree of

indulgence, the complaint fails to state a claim against them. The factual allegations concerning the Marshals are simply that they were present at the hotel-room meeting, carried out certain unspecified improper and unconstitutional orders given by Judge Winner, and acted as "go-betweens" among certain defendants. The Marshals can hardly be faulted for attending a meeting at the direction of the presiding judge, nor could they have had any substantive role to play in the making or execution of the agreement between the Court and counsel for the government with respect to the declaration of a mistrial. The same is true, only more so, of the defendant Sandy Spencer, Judge Winner's second secretary, who is also a Deputy Clerk of the District Court. In fact, the only thing she actually did, so far as the complaint alleges, was to come to the hotel-room meeting at Judge Winner's direction. As to this group of defendants, the complaint is long on invective but short on fact, and we conclude that its allegations are simply too indefinite to state a claim. This holding makes it unnecessary to consider what kind of immunity, whether absolute or qualified, persons acting under the direction of a judge might enjoy.

In short, we agree with the District Court that the complaint failed to state a claim as against this group of non-prosecutor federal defendants, except for the unnamed agents of the FBI, as to whom further proceedings will be open on remand.

V.

A number of state and local governmental entities and officials are also named defendants. First among these are Dale A. Tooley, at the time District Attorney for the City and County of Denver, and Castelar Garcia, Jr., Deputy District Attorney. The complaint alleges that these two state prosecutors instituted a prosecution against Martinez in the state courts that they knew to be unfounded, that was "based upon racial criteria," I R.16, complaint ¶ 44, and that "was for the purpose of harassment . . . ." *Ibid.* Mr. Tooley has died, and plaintiff has not requested that the cause be

revived against his estate or personal representative, so the complaint must be dismissed as to him in any event. As to Garcia, he is immune from liability for damages as a prosecutor for the reasons we have given in part III of this opinion with respect to the federal-prosecutor defendants. He is no longer in office, so injunctive relief against him would have no meaning, and, in any event, as will shortly be seen, the City and County of Denver will remain as a defendant, and injunctive relief entered against them (assuming the proof justifies it) would be fully effective to protect plaintiff's rights. The same is true of declaratory relief: a declaratory judgment entered against the City and County of Denver, a judgment that would necessarily include a recitation of the acts of Tooley and Garcia, would fully vindicate plaintiff's rights. Declaratory relief is in some sense discretionary. It need not be entered against an individual if no real purpose would be served. We conclude that the complaint was properly dismissed as to Messrs. Tooley and Garcia.

The complaint also names as defendants Arthur Dill, "presently [at the time of the filing of the complaint] Chief of Police" of the City of Denver Police Department, I R.13, complaint ¶ 20, and Robert Shaughnessy, "presently a Chief" in the City of Denver Police Department, I R.13, complaint ¶ 19. During the pendency of this appeal, Mr. Shaughnessy died, and Dill has retired as Chief. Plaintiff has not requested that Shaughnessy's estate or personal representative be substituted in his stead, so the complaint against him may be dismissed on this basis alone. In addition, the complaint contains almost no specific information about what either Dill or Shaughnessy did. Nothing is said about Dill, and the only specific allegation concerning Shaughnessy is that he received a copy of a letter Judge Winner sent to the Department of Justice, in which certain allegedly defamatory comments were made about plaintiff. Surely the mere receipt of letter did not violate anyone's constitutional rights. We conclude tha the complaint was properly dismissed as to both Shaughnessy and Dill. They are not alleged to have authorized, approved, or acquiesced in any specific alleged constitutional violations.

As to police officers Robert Nicoletti, a Captain, and J.C. Tyus, a Detective, both of the Denver Police Department, the complaint does allege that they were present at the hotel-room meeting, and that Tyus, in particular, offered to give improper and prejudicial testimony that had previously been ruled inadmissible, in order to provoke defendant into moving for a mistrial. Nicoletti is in the same position as the United States Marshals and Spencer. They only specific act of his alleged in the complaint is his mere attendance at the meeting. But a claim has been properly stated against Tyus under 42 U.S.C. §1983. In addition, the complaint alleges that the City of Denver Police Department had an official policy and plan to repress, vilify, and deny rights to Mexicanos, American Indians, and other "oppressed" national minorities, and that, pursuant to that plan, the Department formulated and issued a "get Martinez" policy and instructions. I R.14, complaint ¶32. In furtherance of that policy, we are told, the Department kept a dossier on plaintiff, including reports, recordings, and other materials concerning his views, associations, and meetings. *Id.* ¶33. The Department also entered into a campaign to charge plaintiff and harass him and others advocating unpopular causes with unfounded prosecutions and to discourage him and others from asserting their rights. *Id.* at 15, ¶36. In or about October 1973, we are told, the Department, because of racial hatred and in order to chill the assertion of rights, obtained a warrant for the false and unfounded arrest of plaintiff, *id.* at ¶37, and, in or about November 1973, the Department "determined, in furtherance of its policy . . . as aforestated, to issue an order to all Denver Police Officers to 'shoot on sight' plaintiff." *Id.* at ¶39.

We think these allegations are clearly sufficient, as a matter of pleading, to satisfy the "policy" or "custom" requirement of *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978). Therefore, the City and County of Denver will remain as a defendant. (The "City of Denver Police Department" is not a separate suable entity, and the complaint will be dismissed as to it.) Governmental entities are not entitled to any sort of immunity under §1983. See *Owen v. City of Independence*, 445 U.S. 622 (1980),

Individual police officers, like Tyus, have no absolute immunity such as that accorded to judges and prosecutors, but they would be entitled to qualified immunity unless they violated clearly established constitutional rights of which reasonable officers knew or should have known at the time of the alleged acts. Whether qualified immunity will be a defense for Tyus, or for any other named officers who might be brought in by amendment (*cf.* the discussion above with respect to FBI agents) is a question of fact to be explored on remand. It could conceivably be raised and decided on motion for summary judgment, but it is not subject to disposition by motion to dismiss, given the allegation of this complaint. We note, in addition, that Officer Tyus did not actually give the improper and prejudicial testimony that he allegedly offered, and that the mistrial was, in the event, declared for quite different reasons. It may be difficult, therefore, for plaintiff to prove any damages as a result of Officer Tyus's actions, but we think he has a right to try, and, in any event, declaratory or injunctive relief to vindicate plaintiff's constitutional rights might be appropriate.

In sum, as to the state and local defendants, we affirm the dismissal of the complaint with respect to Tooley, Garcia, Shaughnessy, Dill, Nicoletti, and the City of Denver Police Department. The dismissal will be reversed as to the City and County of Denver and Tyus, and plaintiff will have leave on remand to move to amend his complaint to name additional specific officers of the Denver Police Department, in much the same fashion as we have discussed above with respect to so-called "John Doe" agents of the FBI.[5]

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[5] We have specifically discussed, as to the state defendants, only the claim under §1983. We hold, for reasons already discussed in the portion of this opinion dealing with the federal defendants, that the complaint also alleges, as to Tyus and the City and County of Denver, legally sufficient claims under §§1981, 1985(3), 1986, and the Fourteenth Amendment. A claim against Tyus is also stated under §1985(2), clause 1. We affirm the dismissal of the claim asserted under §1985(2), clause 2 (conspiracy to obstruct the due course of justice in the state courts). The complaint is too vague to state a claim under this last-cited provision.

VI.

The remaining defendant is Peter Webb, a news reporter for television station KMGH-TV who allegedly interviewed Judge Winner and then published "false matter." The "false matter" alleged in the complaint apparently refers to Judge Winner's accusation that Martinez was a catalyst for terrorist groups, was involved in bombings and riots, and conspired to obstruct justice. The complaint alleges that Webb published this matter with knowledge of its falsity or with reckless disregard for its truth or falsity, and that he did so out of malice. The complaint may be sufficient, despite its failure to set out clearly the substance of what Webb published, to state a claim against him for defamation under the common law of Colorado, but it does not sufficiently allege a claim under the Constitution of laws of the United States. Beyond the bare conclusory allegation that Webb, a private citizen, conspired with the other defendants to deprive plaintiff of his constitutional and civil rights, no facts are stated indicating that Webb did anything other than repeat on the air what Judge Winner had told him. We affirm the dismissal of the complaint as against Peter Webb.

VII.

We summarize our holdings as follows: the judgment of the District Court dismissing the complaint with prejudice is affirmed in its entirety as to the defendants Fred M. Winner, Joseph M. Dolan, Susan Roberts, John R. Barksdale, Dan Christopher, the United States Department of Justice, the Federal Bureau of Investigation, Matt Dunn, Peyton Baer, Les Weisenhorn, Sandy Spencer, Dale A. Tooley, Castelar Garcia, Jr., the City of Denver Police Department, Arthur Dill, Robert Shaughnessy, Robert Nicoletti, and Peter Webb.

Plaintiff may pursue his claim for declaratory and injunctive relief against the successor of the defendant Joseph M. Dolan as United States Attorney for the District of Colorado. He may also seek leave, on remand, to name

specific agents of the Federal Bureau of Investigation and to seek damages, an injunction, and declaratory relief against them.

As to the defendant Jan Chapman, the judgment is reversed and the cause remanded. Plaintiff is free to seek any form of relief (damages, an injunction, or declaratory relief) against her.

As to the City and County of Denver, the judgment is reversed and the cause remanded. On remand, plaintiff may seek any form of relief against this defendant, including damages, an injunction, and a declaratory judgment.

As to the defendant J.C. Tyus, the judgment is reversed insofar as it relates to damages and declaratory relief. Injunctive relief will not be available against this defendant, who is no longer employed by the Denver Police Department.

Each party shall bear his, her, or its own costs on this appeal.

Affirmed in part, reversed and remanded in part with instructions.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 82-BJ-199

FRANCISCO EUGENIO MARTINEZ,

Plaintiff,

v.

FRED M. WINNER, et al.

Defendants.

July 30, 1982

548 F. Supp. 278

MEMORANDUM OPINION

JENKINS, District Judge.

This is a civil rights action alleging wrongdoing on the part of a Federal Judge, a United States Attorney and several Assistant United States Attorneys, several deputy United States Marshals, a host of individuals and agencies engaged in federal and state law enforcement, and a television news reporter. The plaintiff seeks damages for and [sic] declaratory and equitable relief from what he asserts to be an overall consipiracy to deprive him of his civil rights and to "railroad" him into prison on unsubstantiated

criminal charges.[1] The allegations in Martinez' complaint relate to the commencement of a criminal action entitled *United States v. Martinez* and the events leading to a mistrial in that case. Those events have been briefly summarized by the Court of Appeals:

> On November 9, 1973, Martinez was indicted on seven counts relating to possession of unregistered explosives and the sending of explosives through the United States mails. Before trial commenced, in January, 1981, four counts were severed by the district court, Chief Judge Fred Winner presiding. Martinez went to trial on counts one, four, and seven; one count alleged a conspiracy and the other two charged possession of explosives and mailing of the explosives to an individual known as Carol Hogue.
>
> On January 27, 1981, trial commenced in Pueblo, Colorado on the unsevered counts. On January 29, the defendant moved to replace two jurors with two alternates because of complaints allegedly made by the two jurors about spectators wearing T-shirts with "Free Kiko" (defendant's nickname) printed on them. The two jurors had also allegedly complained about a law student at the defense table wearing sun-glasses. The government objected to the motion and Judge Winner denied the motion.
>
> On the evening of the third day of trial, January 29, the trial judge held a secret meeting with the prosecutors, court personnel, and several government witnesses in his hotel room. Neither defendant nor his counsel were notified about this meeting. Judge Winner stated that he believed there was an atmosphere of intimidation in the court room caused by some of the spectators who were sympathetic to the defendant and that he wanted hidden cameras to be installed to record the intimidation. Judge Winner informed the prosecutors that he would grant a motion

[1] See Hearing Transcript [Hrg. Tr.] at 60, 119-121, 130; Complaint at ¶¶64, 89.

for a mistrial, but advised them not to make such a motion until after the cameras were installed and after the defense presented its case. The judge further indicated that he could provoke defense counsel to request a mistrial. One witness, Officer Tyus, stated that he could cause a mistrial by giving testimony which had previously been ruled inadmissible. Judge Winner repeated many of these comments in chambers to United States Attorney Roberts who arrived from Denver the next day. The trial judge also expressed a desire to remain in ex parte contact with the prosecutors. The reason given for not inviting defendant's counsel to the meeting was the court's suspicion (unverified on this record) that one of the defendant's counsel might be involved in a conspiracy to intimidate the jury.

On January 30, the morning after the meeting, the government stated that it "did not object to the granting of defendant's motion for a mistrial." At that time all of the defendant's motions had been overruled. The prosecutor, Mr. Barksdale, explained:

> We understand the jurors' two names were in the newspaper. I was aware of that this morning. We also understand from the Court this morning that the — in court, of course, the juror was — one juror was ill, and we therefore, have changed our position.

The court granted a recess to allow the defense to decide whether to join in the government's motion. The defense then joined in the motion. The trial court granted the joint motion for mistrial.

United States v. Martinez, 667 F.2d 886, 887-888 (10th Cir. 1981) (footnote omitted). The Court of Appeals held in the criminal case that the prosecutors' failure to inform the defense of the January 29 meeting barred retrial on three counts because of the Double Jeopardy Clause.[2] *Id.*, 667 F.2d

[2] The Fifth Amendment to the United States Constitution provides that "[n]o person shall be subject for the same offence to be twice put in jeopardy of life or limb: . . ."

at 890. Martinez now asserts claims for wrongdoing at and after the January 29 meeting as well as claims based upon a pattern of purported wrongdoing by state and federal officials reaching back to before the filing of the indictment against him in November of 1973.[3]

He asserts claims based upon 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, unspecified sections of the Constitution of the State of Colorado, common-law tort actions such as false arrest, false imprisonment, abuse of process, harassment, gross misconduct, outrageous conduct, and negligence, and violations of the Code of Judicial Conduct and the Code of Professional Responsibility.

I. JURISDICTION

Though this action was not commenced in this Court, and the pleadings consequently lack the jurisdictional allegations common to federal complaints, the jurisdiction of this Court is firmly established by the removal statutes relied upon by the defendants in moving the case to this forum. See 28 U.S.C. §§1441(b), 1442(a) (1976). This Court has original jurisdiction of plaintiff's action pursuant to 28 U.S.C. §§1331 (federal question), and 1343(a) (civil rights actions); see *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (actions directly under Constitution), as well as exclusive original jurisdiction of plaintiff's tort claims against the United States. See 28 U.S.C. §1346(b) (1976). Though all but two named defendants have moved to dismiss the plaintiff's complaint, subject matter jurisdiction is not at issue.[4] But see Part VIII, *infra*.

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[3] Martinez alleges that the Denver Police Department adopted "an official policy and plan to overcome, repress, vilify and deny rights to persons and organizations seeking to assert and vindicate their rights," which caused formulation of a more personalized "get Martinez" policy. Complaint at ¶¶29, 32. The federal officials, including Judge Winner, allegedly joined in the effectuation of the "get Martinez" policy at a later date. *Id.*, at ¶50. Martinez alleges a broad pattern of surveillance, intimidation and fabrication of charges.

[4] The plaintiff's expressed fears that this Court will "divest itself of

II. MOTIONS UNDER RULE 12(b)(6)

The defendants' motions uniformly assert that the plaintiff's complaint should be dismissed "for failure to state a claim upon which relief may be granted." Rule 12(b)(6), Federal Rules of Civil Procedure, the modern equivalent of the obsolete plea of demurrer. In determining the issue raised by the motions, the material factual allegations of the complaint are, of course, to be taken as true, see *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740, 96 S.Ct. 1848, 1850, 48 L.Ed.2d 338 (1976); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 222, 68 S.Ct. 996, 999, 92 L.Ed. 1328 (1948),[5] and the complaint is to be read in a light most favorable to the plaintiff. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-422, 89 S.Ct. 1843, 1848-1849, 23 L.Ed.2d 404 (1969); 5 C. Wright & A. Miller, Federal Practice and Procedure §1357 at 594 & n. 46 (1969). A complaint should not be dismissed unless it appears to a certainty that plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim. *Haines v. Kerner*, 404 U.S. 519, 520-521, 92 S.Ct. 99, 594, 595-596, 30 L.Ed.2d 652 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); 2A Moore's Federal Practice ¶12.08 at 2274 (2d ed. rev. 1981). The requisite want of merit "may consist in an absence of law to support a claim of the sort made, or of fact sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." *DeLoach v. Crowley's, Inc.*, 128 F.2d 378, 380 (5th Cir. 1942).[6]

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jurisdiction" contrary to the teachings of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), seem misplaced at best. See plaintiff's Brief in Response at 42-43.

[5] This deference to the pleadings, however, does not extend to allegations in the complaint that state legal conclusions rather than plead material facts. See 2A Moore's Federal Practice ¶12.08, at 2268-2269 & n. 4 (2d ed. rev. 1981), and cases cited therein. Additionally, unwarranted inferences of fact or conclusions of law may not be drawn from the pleaded facts in order to preclude dismissal. See *Ryan v. Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957).

[6] Rule 8(f) of the Federal Rules of Civil Procedure provides that "[a]ll pleadings shall be construed as to do substantial justice."

III. THE EIGHTH AND THIRTEENTH AMENDMENT CLAIMS

The complaint, paragraphs 163-164, 167-168, alleges in a conclusionary fashion that the conduct of the defendants described in the complaint (jointly and severally) violates the plaintiff's rights under the Eighth[7] and Thirteenth[8] Amendments to the United States Constitution. Yet Martinez' complaint describes no "excessive" bail requirement, see *e.g., Stack v. Boyle*, 342 u.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951); *United States v. Beaman* 631 F.2d 85 (4th Cir. 1980), no imposition of an excessive fine (or any fine, for that matter), *e.g., United States v. Miller*, 588 F.2d 1256 (9th Cir. 1978), *cert. denied* 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636, nor facts even approaching the imposition of a "cruel and unusual punishment," *e.g., Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976), or conditions of "slavery or involuntary servitude." See *e.g., United States v. Booker*, 655 F.2d 562 (4th Cir. 1981).[9]

One can only conclude from a careful reading of the lengthy pleading filed by the plaintiff that these claims for relief are surplusage.[10]

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[7] the Eighth Amendment provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[8] The Thirteenth Amendment provides that:

> Sec. 1 Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Sec. 2 Congress shall have power to enforce this article by appropriate legislation.

[9] Martinez' claims arising under legislation enacted pursuant to §2 of the Thirteenth Amendment, e.g., 42 U.S.C. §1981, are examined elsewhere. See Part VII, *infra*.

[10] The Bill of Rights and later amendments such as the Thirteenth

The 189 paragraphs of the complaint in this action are heavily laden with colorful legal terminology. Paragraph 38, for example, alleges that

> 38. Said [Denver] Police Department and named and unnamed officers and employees thereof investigated the allegations against plaintiff in a reckless and negligent manner so as to deny him the equal protections of the laws through malicious abuse of process.

That a defendant could *negligently* engage in a *malicious* act seems incongruous. Abuse of process (if that be the ground relied upon) is an intentional tort. See Restatement (Second) of Torts §682 (1977). The plaintiff's conclusory assertions of liability under the Eighth and Thirteenth Amendments exhibit similar weaknesses. The complaint offers conclusions of liability under these two amendments, without a factual premise.

Rule 8(e)(1), F.R.Civ.P., — useful in both federal and state litigation — states that "[e]ach averment of a pleading shall be simple, concise and direct," and Rule 8(a) directs that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

Since no such claims under the Eighth and Thirteenth Amendments appear within the four corners of the pleading, Counts X and XII shall be and are DISMISSED as against all defendants. See also Rule 12(f), Federal Rules of Civil Procedure.

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encompass important statements of specific principles. They are not a magical incantation that one recites to draw down the wrath of the Court upon defendants. To be sufficient, a complaint must set forth facts reflecting a specific violation of a particular constitutional limitation or requirement. See *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979); *Taylor v. Nichols*, 409 F. Supp. 927, 932 (D. Kan. 1976), *affirmed* 558 F.2d 561 (10th Cir. 1977). Martinez' complaint repeatedly fails to do so.

IV. CLAIMS UNDER THE NINTH AMENDMENT

Similarly, all one can say about Martinez' Ninth Amendment claims is that they are alleged in Count XI of the complaint as conclusions. The Ninth Amendment provides:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

The complaint nowhere particularizes which of these unenumerated rights have allegedly been violated, how they have been violated, or by whom. This leaves the Court in the curious position of having to identify the plaintiff's Ninth Amendment claims through a comparison of Martinez's "factual" allegations with the body of governing case law as it has developed under that amendment. Chief Justice Burger offered some guidance in a recent opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980):

> Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.

Id., 448 U.S. at 579-580, 100 S.Ct. at 2828-2829 (footnote omitted) (Burger, C. J., for plurality). In *Richmond Newspapers*, the Court found the right to attend criminal trials to be constitutionally protected by implication. *Id.* at 580, 100 S.Ct. at 2829.

Relying upon the Chief Justice's informal enumeration,

as well as similar authority,[11] this Court will search among the penumbral shadows of plaintiff's other claims for the defendants' alleged Ninth Amendment liabilities.

The plaintiff's allegations against the federal defendants make up a veritable pepper pot of claims, including constitutional, statutory and common-law causes of action. The defendants in return have asserted various forms of official immunity to those claims, and have attacked the allegations as meritless on their face. For convenience, the claims and defenses shall be determined by category of defendant.

V. CLAIMS AGAINST JUDGE WINNER

Many of the allegations of the complaint focus on the conduct of Chief Judge Winner before and during the jury trial in *United States v. Martinez*. Martinez asserts that Judge Winner received and read police surveillance materials and reports concerning Martinez which were gathered and provided by the Denver police and the Federal Bureau of Investigation.[12] He further claims that Judge Winner assigned the *Martinez* case to himself in violation of established work distribution procedures, that he

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[11] See *e.g., Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956). Rather than serving as a substantive source of constitutional guarantees, the Ninth Amendment acts as a forceful reminder of the duty of the federal courts to protect unenumerated fundamental rights. "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Griswold v. Connecticut*, 381 U.S. 479, 492, 85 S.Ct. 1678, 1686, 14 L.Ed.2d 510 (1965) (opinion of Goldberg, J.). Cf. *Charles v. Brown*, 495 F.Supp. 862, 864 (N.D.Ala. 1980) ("[T]he Ninth Amendment is merely a rule of construction . . . [T]here are no constitutional rights secured by that amendment.").

[12] The plaintiff's brief states that "Judge Winner decided to insure conviction of plaintiff at the trial as a result of the intelligence reports and his animosity towards plaintiff." *Id.*, at 9. This kind of mindreading involves, at best, the drawing of an inference rather than expression of a known fact. It is certainly one not necessarily drawn. See *Ryan v. Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957).

maintained "tight" security arrangements in the courtroom, that he made rulings unfavorable to the defense, and that he planned and/or conspired to have hidden cameras installed to conduct surveillance on spectators in the courtroom and to "spy on" Martinez and his defense attorneys. Further, the complaint alleges that he conspired with the persons he called to the *ex parte* meeting on January 29, 1981 to procure the conviction of Martinez and to prosecute Martinez' supporters who attended the trial through the use of evidence to be obtained by the hidden cameras.[13] See complaint, at ¶¶69-111. The complaint alleges that Judge Winner utilized the news media to publish "false and libelous" accusations against Martinez. Complaint, at ¶¶112-122. Counsel for the plaintiff asserts that the Judge's actions and omissions in and around the trial were acts in furtherance of a "conspiracy by Judge Winner, F.B.I. agents and police to railroad plaintiff to jail, . . ." Plaintiff's Brief in Response, at 10; see also Complaint, at ¶64 ("defendant Winner determined to have plaintiff convicted of a crime and railroaded to jail in order to chill plaintiff. . .").

The threshold inquiry would seem to be whether defendant Winner's actions were "judicial" acts, or whether they were conduct of a different sort, e.g., of an investigative nature. In *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), the United States Supreme Court identified two factors to be considered in determining whether an act is "judicial": (1) "the nature of the acts itself, *i.e.*, whether it is a function normally performed by a judge," and (2) "the expectation of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.*, 435 U.S. at 361, 98 S.Ct. at 1107. A judge who acts in the "clear absence of all jurisdiction" *id.*, 435 U.S. 357, 98 S.Ct. at 1104, is not acting "judicially"; a judge, on the other hand, who is acting within his jurisdiction is likely engaging in "judicial" actions, notwithstanding the fact that the judge may have

[13] The further assertion that he assigned court personnel to the case who were hostile to the plaintiff "for the purpose of affecting the jurors' deliberations," see Plaintiff's Brief at 13, does not appear in the complaint.

committed "grave procedural errors." *Id.*, 435 U.S. at 359, 98 S.Ct. at 1106. The complaint avers no "clear absence of jurisdiction" in *United States v. Martinez*. The question "whether at the time he took the challenged action he had jurisdiction over the subject matter before him," *Stump v. Sparkman, supra*, 435 U.S. at 356, 98 S.Ct. at 1104, must be answered in the affirmative.

The inquiry thus turns to the nature of the acts and the perceived capacity of the actor. There are few acts more "judicial" than the making of rulings upon motions and objections during the course of a trial. That is a part of a trial judge's function. Control over the admission and presentation of evidence, for example, is expressly vested in the trial judge. Rule 611, Federal Rules of Evidence. A claim arising from a judge's rulings on motions is a claim concerning a "judicial" act. See *Clark v. Taylor*, 200 U.S.App.D.C. 231, 627 F.2d 284, 288 (1980).

Similarly, the division of the workload in a federal district court is a "judicial" function governed "by rules and orders of the court." 28 U.S.C. §137 (1976). As chief judge, defendant Winner possessed authority to secure the observance of such rules and orders, and to "divide the business and assign the cases as far as such rules and orders do not otherwise prescribe." *Id.* If the district judges prove unable to agree on an appropriate distribution system, "the judicial council of the circuit shall make the necessary orders." *Id.*, 28 U.S.C. §332. It is significant that the Administrative Office of the United States Courts plays no part in this matter. See 28 U.S.C. §§601 *et seq.* If a chief judge violates an outstanding order on workload distribution, the appropriate remedy is a petition to the appropriate court of appeals for a writ of mandamus. See *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1104 (10th Cir. 1972) (per curiam); *Kerr-McGee Corp. v. Ritter*, 461 F.2d 1104, 1105 (10th Cir. 1972) (per curiam), or raising the question after the fact as an error from which an appeal is taken.

> The agreed distribution of business . . . is merely to promote accord and avoid conflict; it may be

> imperative, so far as it extends, but it does not go to the essence of the judge's power. . . . [C]ompliance with every rule of court is not essential to the judge's jurisdiction, nor may his acts be ignored if they do not conform to all. There is a way to correct such errors which must be followed. Yet unless rules for the distribution of business stand on a different footing from rules in general, the decrees vacated were not the empty words of a mere intruder.

Johnson v. Manhattan Ry. Co., 61 F.2d 934, 938 (2d Cir. 1932), *affirmed* 289 U.S. 479, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). In *Johnson*, the Senior Circuit Judge for the Second Circuit assigned himself to sit in the Southern District of New York and then designated himself to sit in a specific case involving the Interboro Rapid Transit Company. He then appointed receivers to manage property that was a subject of the suit. Johnson filed a collateral lawsuit that assailed the authority of the Senior Circuit Judge to make the appointments. The Court of Appeals for the Second Circuit held that the work allocation rules "are only directory, and that their disregard was at most no more than error." *Id.*, 61 F.2d at 939; "however valid the rules may be," a judge's order in violation of them "*would still be a judicial act*, unassailable collaterally." [Emphasis added.] *Id.*, 61 F.2d at 938. The Supreme Court affirmed. Though conceding that the Senior Circuit Judge had "acted hastily and evidently with questionable wisdom," *id.*, 289 U.S. at 505, 53 S.Ct. at 730, the court held the receivership appointments to be beyond collateral attack.[14]

Contrary to the plaintiff's bald assertion, the control of order and security in and around the courtroom is an essential "judicial" function. In reviewing the famous Sam Sheppard murder trial, the United States Supreme Court observed that the "carnival atmosphere" at that trial "could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court."

[14] The court urged the judge to withdraw from the proceedings voluntarily to avoid further "embarassing the receivership." *Id.*, 289 U.S. at 505, 53 S.Ct. at 730.

Sheppard v. Maxwell, 384 U.S. 333, 358, 86 S.Ct. 1507, 1519, 16 L.Ed.2d 600 (1966). Where, for example, it appears that a criminal defendant's supporters are attempting to intimidate and harass witnesses and otherwise disrupt a trial, "the trial judge must exercise his power to exclude those who act and those who appear to be acting in concert with them lest it be impossible for the trial to proceed and for the jury to pass on the charges." *United States v. Fay*, 350 F.2d 967, 970 (2d Cir. 1965).

The United States Court of Appeals for this circuit has already stated that "[t]he type and necessity of precautionary measures taken during the course of the trial is within the sound discretion of the trial court." *Snow v. State of Oklahoma*, 489 F.2d 278, 280 (10th Cir. 1973) (citations omitted). Exercise of that discretion is an exclusively "judicial" function:

> It is essential to the proper administration of criminal justice that dignity, order and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. . . .

Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970).

The complaint does not allege that Martinez was bound and gagged, shackled, or involuntarily removed from the courtroom during trial.[15] Rather, it asserts that "defendant

[15] Under appropriate circumstances, these techniques may be used to restore order without violating constitutional standards. See *Illinois v. Allen*, *supra*, 397 U.S. at 344, 90 S.Ct. at 1061. Courtroom spectators may also be the subjects of careful security and control. See *e.g.*, *In re Trials of Pending and Future Criminal Cases*, 306 F.Supp. 333, 336-337 (N.D.Ill. 1969).

Winner issued orders designed and intended to create an atmosphere and climate of unconstitutional intimidation and tension in the courtroom. . . ." Complaint, at ¶69. This was allegedly accomplished through placement of deputy marshals and police officers in the courtroom, searches of persons and items entering the courtroom, and in general, ordering "tight" security. *Id.*, at ¶71. Such measures, says plaintiff, are not a judicial matter: "[A]cts of providing for courtroom security are routinely and ordinarily determined upon, handled and undertaken by the United States Marshal and his deputies." *Id.*, at ¶72.

In asserting that Winner's orders regarding courtroom security are not "judicial," plaintiff misconceives the focus of power to control courtroom conduct. As the Court of Appeals for the Fourth Circuit has explained, it is for the Court to balance the interests of the defendant in having the indicia of innocence, *e.g.*, a minimum of physical restraint, in appearances before the jury and the interests of the press and the public in attending trials against needs for security to maintain order and decorum in the courtroom:

> The cases traditionally state that accommodation between these conflicting interests lies within the discretion of the district judge. It is he who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes. *E.g.*, *Gregory v. United States*, 365 F.2d 203 (8th Cir. 1966); *Guffey v. United States*, 310 F.2d 753 (10th Cir. 1962).

United States v. Samual, 431 F.2d 610, 615 (4th Cir. 1970). As to the relative role of the Marshal, the court stated:

> We stress that the discretion is that of the district judge. He may not, as is suggested at one part in the record before us, delegate that discretion to the Marshal. Of course he should consult with the Marshal when other than ordinary security such as the general presence of guards in the courtroom is contemplated, and he may rely heavily on the Marshal's advice as to what may be required. . . .

Id., 431 F.2d at 615. The exercise of the trial judge's discretion in controlling courtroom security is subject to appellate review. A reviewing court may determine if an abuse of discretion has occurred. *Id.* The exercise of this discretion is nevertheless "judicial" within the criteria set forth in *Stump v. Sparkman* and other cases.

Concerning the January 29 meeting, the complaint alleges as follows:

> 90. Defendant Winner proposed at the aforestated January 29, 1981 meeting that:
>
> a) he would be "meaner" to plaintiff if the prosecution desired;
>
> b) the prosecution should ask for a mistrial;
>
> c) the mistrial request should be made only after the prosecution had gained knowledge of the defenses and the defense strategy;
>
> d) the mistrial could be procured by Defendant Winner's deliberate provocation of one of plaintiff's attorneys;
>
> e) the mistrial would be granted whenever the prosecution wanted it;
>
> f) the mistrial would be granted only under circumstances which would not support a claim of double jeopardy;
>
> g) in the new trial, the prosecution should improve its presentations of the case in order to insure plaintiff's conviction.

Complaint, at ¶90. While these are the most damning of the complaint's specific allegations, such averments describe "judicial" acts. Defendant Winner, as presiding judge at the *Martinez* trial, called the prosecutors, deputy marshals and certain witnesses to a meeting. He discussed the granting of a mistrial in a manner which, though here pleaded in

contradictory terms,[16] was sufficient standing alone to make a mistrial a "manifest necessity". *Arizona v. Washington*, 434 U.S. 497, 505-508, 98 S.Ct. 824, 830-831, 54 L.Ed.2d 717 (1978). The implications of the defendant Winner's remarks possess gravity because he was speaking as the judge regarding the impending performance of his role in the trial then before him. The alleged comments reflect a purpose to engage in "judicial" conduct in an injudicious manner.[17]

It is apparent, therefore, that the acts which the plaintiff asserts give rise to liability were "judicial" acts,[18] a determination of particular importance to the question of official immunity.

It seems well settled at this point that a judge "is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Stump v. Sparkman*, 435 U.S. 349, 359, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). Moreover, a judge cannot be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in " 'clear absence of all jurisdiction.' " *Id.*, at 356-357, 98 S.Ct. at 1104-1105; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871); *Rheuark v. Shaw*, 628 F.2d 297, 304 (5th Cir. 1980).

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[16] As alleged in the Complaint, ¶90(e) is not synonymous with ¶90(f).

[17] In one case, the Court of Appeals for the Ninth Circuit has determined that an agreement to predetermine the outcome of a judicial proceeding prior to the commencement of the proceeding was not a "judicial" act. *Rankin v. Howard*, 633 F.2d 844, 847 (9th Cir. 1980). The scope of this ruling seems very limited. Compare *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 978 (5th Cir. 1979) (en banc), *affirmed sub nom.; Dennis v. Sparks*, 449 U.S. 24, 27-32, 101 S.Ct. 183, 186-188, 66 L.Ed.2d 185 (1980). In any event, the plaintiff's complaint herein alleges no such preindictment agreement involving Judge Winner. Such an agreement would likely prove ineffectual because a jury rather than Judge Winner would determine the outcome of the proceeding.

[18] The plaintiff's charge that Judge Winner held "views of social and political animosity towards plaintiff" is discussed *infra* at pp. 307-308.

This common-law doctrine of absolute judicial immunity has been described as "[a] seemingly impregnable fortress in American jurisprudence." *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974).[19] Yet judicial immunity, like other forms of official immunity, "is not a badge of emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Mateo*, 360 U.S. 564, 572-573, 79 S.Ct. 1335, 1340, 3 L.Ed.2d 1434 (1959). "Immunity is thought necessary to insulate judges from intimidation that might rob them of the independence so crucial to the public's interest in principled and fearless decision-making." *Gregory v. Thompson, supra*, 500 F.2d at 63.

> This immunity applies even when the judge is accused of acting maliciously or corruptly, and it "is not for the protection or benefit of a malicious or [corrupt judge, but for the benefit of the public, whose interest it is that the judge should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868) quoted in *Bradley v. Fisher*, [80 U.S. (13 Wall.) 335,] 349, note at 350 [20 L.Ed. 646].) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him

[19] The doctrine of absolute judicial immunity dates back to at least 1607. In *Floyd v. Barker*, 77 Eng. Rep. 1305, 1307, 12 Coke 25 (1807), it was observed that judges of the realm ought not to be called in question for any judicial proceedings by them, except before the king himself, "for this would tend to the scandal and subversion of all justice; and those who are most sincere would not be free from continual calumniations." The doctrine received its first reported American recognition in *Yates v. Lansing*, 5 Johns 282 (N.Y. 1810).

In *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536-537, 19 L.Ed. 285 (1868) and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1871), the Supreme Court adopted the doctrine, observing in *Randall* that "[t]his doctrine is as old as the law and its maintenance is essential to the administration of justice." *Id.*, 74 U.S. (7 Wall.) at 536.

> with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d (1967). In *Pierson*, the United States Supreme Court held that the common-law doctrine of judicial immunity was not abridged by the enactment of the Civil Rights Act of 1871 as codified in 42 U.S.C. §1983:

> We do not believe that this settled principle of law was abolished by §1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.

Id., 386 U.S. at 554, 87 S.Ct. at 1217. State judges are thus immune from suit under §1983 for their "judicial" acts.

In *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), the Supreme Court again affirmed the continuing force of the doctrine of judicial immunity, making clear that the question of immunity in no way depends upon the relative propriety or error to be found in a judge's actions. *Stump* unequivocally holds that immunity arises from the judicial nature of actions taken with at least a colorable claim of jurisdiction. *Id.*, 435 U.S. at 363-364, 98 S.Ct. at 1108; see also *Apton v. Wilson*, 506 F.2d 83, 90 (D.C.Cir. 1974).

Both *Pierson* and *Stump* deal directly with the liability of state judges pursuant to 42 U.S.C. §1983. In this case, plaintiff has asserted claims against Judge Winner arising under that section and §1985 as well as direct claims under the Constitution itself. Compare *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

In *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961), the Court of Appeals for this circuit affirmed the dismissal of a

lawsuit alleging that the judge and prosecutor in plaintiff's criminal trial "conspired together in the judge's chambers to deprive the plaintiff of a fair trial, as guaranteed by the 14th Amendment to the Constitution," all in violation of 42 U.S.C. §§1983, 1985(3). Deciding the case six years prior to *Pierson*, the court in *Kostal* observed that "[w]e have held that the Civil Rights Act does not impair the traditional common-law immunity of judges from personal liability in damages for their official acts in matters within their jurisdiction." *Id.*, 292 F.2d at 493 (citations omitted). The plaintiff now asks this Court to engraft an exception upon the rules reaffirmed in *Pierson*, *Stump*, *Kostal* and other cases, an exception imposing liability upon a federal judge for intentionally wrongful and/or conspiratorial violations of the Civil Rights Act, or the Constitution.

Counsel's sweeping statements about the scope of liability under the civil rights acts notwithstanding,[20] this Court can find no substantive legal or constitutional basis for such an exception. In fact, the governing case law is contrary to plaintiff's view. In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the United States Supreme Court declared that "without congressional directions to the contrary, we deem it untenable to draw a

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[20] For example, at page 24 of the plaintiff's brief, counsel asserts that the Civil Rights Acts "were intended to provide a civil forum for the redress, by way of damages or other relief, of any violation or deprivation of constitutional or civil rights no matter the context in which such deprivation occurred."

The language of the Civil Rights Acts, 42 U.S.C. §§1981 *et seq.* is broad and sweeping. "By its terms, §1983 'creates a species of tort liability that on its face admits no immunities.'" *Owen v. City of Independence*, 445 U.S. 622, 634, 100 S.Ct. 1398, 1407, 63 L.Ed.2d 673 (1980), *quoting Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976). Immunities have nevertheless been recognized. See *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (absolute legislative immunity); *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 39 L.Ed.2d 358 (1979) (state immunity).

"The existence of a §1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted." *Freeman v. Flake*, 448 F.2d 258, 261 (10th Cir. 1971).

distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials." *Id.*, 438 U.S. at 504, 98 S.Ct. at 2909. In *Butz*, the question directly raised was whether federal officials were entitled to *greater* immunity than their state counterparts. The Court held they were not. Logically, it seems equally untenable to hold that federal officials, particularly federal judges and officers of the court are entitled to a lesser immunity than state judges and court officers. The policies underpinning judicial and judicially related immunities are at least as strong in relation to the federal courts:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall., at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, U.S. at 554 [, 87 S.Ct. at 1217]. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Butz v. Economou, *supra*, 438 U.S. at 512, 98 S.Ct. at 2913. The court in *Butz* makes no exception to the rule of *Pierson*, *Stump*, and *Bradley v. Fisher*; to the contrary, it expressly extended absolute immunity from damage liability to federal hearing examiners and administrative law judges. *Id.*, 438 U.S. at 514, 98 S.Ct. at 2914.

The Courts of Appeal have also rejected the notion that judges are liable for judicial acts engaged in as part of an alleged conspiracy. In *Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (per curiam), the plaintiff alleged a conspiracy by six attorneys and eight judges involved in her divorce proceedings to violate her constitutional rights "by keeping her in a state of poverty for the purpose of hindering the

effective prosecution of her case," *Id.*, 616 F.2d at 1091, all in violation of 42 U.S.C. §§1983, 1985(3). The district court dismissed the judge defendants on the basis of judicial immunity. The Court of Appeals affirmed:

> The district court dismissed appellant's action against the judge appellees on the basis of judicial immunity. Appellant maintains that the doctrine of judicial immunity, being of common law stature, has been superceded by the Civil Rights Act. That argument was specifically rejected by *Stump v. Sparkman*, . . . and *Pierson v. Ray*, . . .
>
> Appellant contends alternatively that a judge who violates a litigant's legal rights is not acting in his or her judicial capacity. *Stump* and *Pierson* similarly dispose of that argument. The district court correctly dismissed the claims against the judge appellees.

Id., 616 F.2d at 1091 (citations omitted). In *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980), the Court of Appeals for the Eighth Circuit similarly held a judge defendant immune from suit under §1983 for allegedly meeting with counsel for a second defendant "and a member of the prosecutor's staff to 'arrange for the denial of admission into evidence' of certain materials which [their defendant] Keating planned to introduce at trial." *Id.*, 638 F.2d at 1122. Plaintiff directs this Court's attention to no recent case in which the Tenth Circuit has made any retreat from its position in *Kostal v. Stoner*, *supra*, 292 F.2d at 493, that judicial immunity bars conspiracy claims under §§1983 and 1985 relating to "judicial" acts. See also *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981).

The force of existing case authority aside,[21] the bar of

[21] The case reports are replete with examples of the uniform application of judicial immunity to bar private civil actions against judges arising from their judicial actions. See *e.g.*, *Moore v. Burger*, 655 F.2d 1265, 1266 (D.C.Cir. 1981) (per curiam) (Supreme Court Justices held immune); *Sullivan v. Kelleher*, 405 F.2d 486, 487 (1st Cir. 1968); *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir. 1978), *cert. denied* 436 U.S. 906, 98 S.Ct. 2238,

absolute immunity as against suits arising out of a judge's conduct of a proceeding makes logical sense and serves sound public policy. "The cases granting absolute immunity to judges recognize that extraordinary reasons are required to justify the drastic step of barring the genuinely wronged individual from any redress against the wrongdoer." *Sellars v. Procunier*, 641 F.2d 1295, 1299 (9th Cir. 1981). The most significant reason is the potential effect of such suits upon the judges and the judicial system.

> The judge is in a unique posture in the adversary system. His or her sole task is to make impartial decisions in vigorously contested actions, to "decide '[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings.'" *Butz v. Economou*, 438 U.S. at 509, 98 S.Ct. at 2912 quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348, 20 L.Ed. 646 (1872). The threat of constant litigation against the decision-maker is apparent . . . . Judges should not have to fear that unsatisfied litigants may hound [them] with litigation charging malice or corruption." *Pierson v. Ray*, 386 at 554, 87 S.Ct. at 1217.
>
> Thus, the proper functioning and indeed the very survival of any independent, dispute-resolving system requires that the dread of subsequent lawsuits

56 L.Ed.2d 405; *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 711 & n. 13 (3d Cir. 1978), *cert. denied* 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978); *Wilkins v. Rogers*, 581 F.2d 399, 404-405 (4th Cir. 1978); *Rheuark v. Shaw*, 628 F.2d 297, 304 (5th Cir. 1980), *cert. denied* 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365; *Littleton v. Fisher*, 530 F.2d 691, 692 (6th Cir. 1976); *Briscoe v. LaHue*, 663 F.2d 713, 722 (7th Cir. 1981); *Duba v. McIntyre*, 501 F.2d 590, 591-593 (8th Cir. 1974), *cert. denied*, 424 U.S. 975, 96 S.Ct. 1480, 47 L.Ed.2d 745; *Beard v. Udall*, 648 F.2d 1264, 1268 (9th Cir. 1981); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981); and see generally, 51 West's Federal Practice Digest 2d at 524-542; *Id.*, 1982 pocket part at 94-100 (1981).

Of course, "[a] judge can be liable for participating in a conspiracy if the acts indicating participation were taken by the judge 'otherwise than in his judicial role.'" *Beard v. Udall*, 648 F.2d 1264, 1270 (9th Cir. 1981), quoting *Slavin v. Curry*, 574 F.2d 1256, 1264 (5th Cir.) *modified*, 583 F.2d 779 (1978). See *e.g., Crowe v. Lucas*, 595 F.2d 985, 990 (5th Cir. 1979).

> be prevented from becoming a factor in a judge's assessment of the merits of a case.

Sellars v. Procunier, *supra*, 641 F.2d at 1299-1300.

Beyond the intimidating effect of the litigation, the burden of defense of such suits could readily consume much of a judge's time and energy, taking him or her away from normal duties.[22]

Furthermore, there are safeguards against abuse built into the judicial process that minimize any necessity for a private civil damages action to redress erroneous or unconstitutional judicial conduct.[23] As the Supreme Court said in *Pierson v. Ray*, *supra*, 386 U.S. at 554, 87 S.Ct. at 1217, "*[a judge's] errors may be corrected on appeal*, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." [Emphasis added].

The appellate remedy is a good remedy. It is an effective remedy. As the Supreme Court has reminded us, "it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975).[24]

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[22] This is a burden that is not avoided even in suits seeking a declaratory judgment rather than damages.

[23] As the Supreme Court observed in *Butz v. Economou*, *supra*, 438 U.S. at 512, 98 S.Ct. at 2913:

> At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling constitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving constroversies, the adversary nature of the process, and *the correctability of error on appeal* are just a few of the many checks on malicious action by judges. [Emphasis added and footnote omitted].

[24] In *Huffman*, the Court held that the abstention standards of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 639 (1971), "must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellant remedies," *id.*, 420 U.S. at 609, 95 S.Ct. at 1210, but who has filed a civil rights action seeking relief against the state court under §1983.

At the hearing, this Court raised the question of the availability and efficacy of the appellate remedy, and whether the §1983, §1985, or the *Bivens*-type civil remedy is available to collaterally attack judicial and prosecutorial conduct in and concerning a trial which may be the subject of an appeal.

Those questions seem particularly meaningful in this case by virtue of the fact that the plaintiff here *prevailed* in an appeal from the attempted retrial of his criminal charges. The Court of Appeals found that portions of the conduct complained of herein barred a retrial of such charges under the Double Jeopardy Clause. *United States v. Martinez*, *supra*, 667 F.2d at 889-890.

Counsel adamantly insists that plaintiff may maintain his civil action against the judge and other defendants regardless of the appellate process. At the hearings, counsel responded to this Court's inquiry as follows:

> THE COURT: . . .[I]n essence you are saying, are you not, that in any situation where a criminal defendant is found not guilty or a criminal defendant is triumphant at the Court of Appeals level that he is in a position to bring an action?
>
> MS. GRAHAM: Absolutely and there are thousands of such cases. [§]1983 in a state matter, [§]1981, no question about it. There are thousands of cases of that kind.
>
> * * * * * *

Hrg. Tr. at 53-54; see *id.* at 50-62. In the plaintiff's brief it is asserted:

> The damages and other relief that may be recovered by means of lawsuits charging violations of those [Civil] Rights Acts] and of the Constitution are not in any way dependent upon the outcome, favorable or otherwise, of a criminal prosecution . . . .

> While examples abound, the plain answer is that the Civil Rights Acts and their jurisdictional counterparts express no limitation on their use to seek damages, by a criminal defendant who was acquitted or otherwise had the charge against him dismissed. If the laws and constitutional provisions providing for rights are violated once, or an attempt is made through a conspiracy to abrogate them the later connection of the violation, or the failure of the conspiracy, does not destroy the causes of action set forth. To hold to the contrary would encourage the flouting of rights. To counsel's knowledge, no court has so ruled.

Plaintiff's Brief in Response, at 24, 27. In making this argument, the plaintiff directly relies upon *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), both of which are cases holding that law enforcement officers may be liable in damages under the Civil Rights Act, or the Constitution itself, for conduct related to unlawful searches and seizures. The *Hampton* case arose from the planning and execution of a police raid upon an apartment occupied by members of the Black Panther's Party, and the resulting shoot-out and post-raid cover-up by police officials. A careful reading of the 61 pages of opinion in *Hampton* discloses no civil damages claim against a judge for conduct in or concerning the handling of a criminal trial. Indeed, to the extent that Hanrahan and other prosecutor defendants were held potentially liable, it was because they were "performing investigative rather then advocacy functions" in planning and participating in the raid.[25] *Id.*, 600 F.2d at 631-633. The court reaffirmed its

[25] The *Hampton* Court held Hanrahan and the other state prosecutor defendants to be absolutely immune from suit under §§1983 and 1985 for their post-raid prosecutorial activities which were involved "in initiating a prosecution and in presenting the state's case." *Id.*, 600 F.2d at 631-632, quoting *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). Their immunity claims were upheld in the face of allegations that they instituted unfounded prosecutions in order to harass the survivors of the raid. *Id.*, 600 F.2d at 630. Defendant Hanrahan had dismissed those indictments before trial. *Id.*, 600 F.2d at 620.

earlier finding that the prosecutors' "alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than the activities of police officers allegedly acting under [their] direction.'" *Id.*, 600 F.2d at 632, quoting *Hampton v. City of Chicago*, 484 F.2d 602, 609 (7th Cir. 1973), *cert. denied* 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974).

Similarly, in *Bivens* the plaintiff sought to recover damages in a direct action under the Fourth Amendment arising out of the warrantless entry and search of his apartment by federal narcotics agents and his subsequent warrantless arrest. Bivens did not complain of any unconstitutional abuse by a judge, or a prosecutor, or a deputy marshall or bailiff. Any charges against Bivens had been dismissed long before a trial. In the *Bivens* case, the question was merely:

> Whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

Id. 403 U.S. at 397, 91 S.Ct. at 2005 (citations omitted). Having determined that Bivens' complaint stated a cause of action under the Fourth Amendment the Court held that the plaintiff was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Id.*

The *Bivens* case went no farther than redressing injuries arising from the unconstitutional search and seizure and establishing the liability of those who perpetrated it. No "judicial" or judicially related conduct was at issue.

Plaintiff relies on a third case,[20] *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958), in arguing that a criminal

[20] A fourth case cited by plaintiff, *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), which dealt with discriminatory bail practices, was *reversed*

defendant may assert an independent civil damages remedy to redress trial misconduct. *Baldwin*, which counsel says "comes closest to factural situation herein," dealt with racial segregation in the waiting rooms of the Birmingham Railroad Terminal. Plaintiffs brought a class action suit for injunctive and declaratory relief against the Alabama Public Service Commissioners, Commissioners of the City of Birmingham, and the Birmingham Terminal Company alleging the maintenance of an "interstate and white waiting room," and other rooms from which black persons were excluded. *Id.*, 251 F.2d at 783-784. Misconstruing the meaning of "state action" under §1983 and the correct scope of the plaintiffs' complaint, the district court dismissed the action on the basis that charges against some plaintiff arising from arrests under the challenged policy had been dismissed. Observing that " '[m]isuse of power, possessed by virtue of state law and made possible by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken' under color of 'state law,' " *id.*, 251 F.2d at 786, quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941) the Court of Appeals reversed, holding that the plaintiffs stated a viable, justiciable cause of action concerning the policy or custom of segregation at the Terminal:

> [T]his city criminal case, or its dismissal, was not the Civil Rights case before the Court below. When the criminal proceeding was closed, it did not automatically take with it the charge made in this cause that state agencies, *pretending to act for the state and exerting the power of their respective offices* were, *under the threat of arrest or other means*, depriving Negroes of the right to be free of discrimination *in railway public waiting rooms on account of race or color*.

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and vacated by the United States Supreme Court *sub nom. O'Shea v. Littleton*, 414 U.S. 488, 514, 94 S.Ct. 669, 685, 38 L.Ed.2d 674 (1974). The Court held that the case lacked the requisite "case or controversy" under Article III.

Counsel for plaintiff nowhere mentions the fact of this reversal.

Id., 251 F.2d at 787 (emphasis added).[27]

Nothing in *Baldwin* speaks to judicial conduct, or to error or misconduct by anyone during the course of a trial, or to damages actions arising out of a trial. Plaintiffs, as noted, were seeking declaratory and injunctive relief against a state-sanctioned policy and custom of racial segregation in public facilities.

Returning momentarily to *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the plaintiffs in that case, a group of white and black clergymen, sought damages from police officers who arrested them, and from the judge who convicted them for "breaching the peace" by using segregated waiting room facilities in a bus terminal in Jackson, Mississippi in 1961. Such convictions were held unconstitutional in *Thomas v. Mississippi*, 380 U.S. 524, 85 S.Ct. 1327, 14 L.Ed.2d 265 (1965). In *Pierson*, as discussed *supra*, the Supreme Court held the judge to be absolutely immune from damages suits arising out of his clearly unconstitutional yet plainly "judicial" actions. The Civil Rights Act did not abrogate that immunity. *Id.*, 386 U.S. at 553-555, 87 S.Ct. at 1217.

It seems irrefutable that *Pierson*, *Stump v. Sparkman*, and related cases strike at the heart of plaintiff's argument. The cases uniformly reject the availability of a civil rights damages action as a remedy for judicial misconduct, particularly where an appellate remedy is, or has been[,] available.

A similar problem has arisen when attorneys have sought to challenge state court disciplinary or admission proceedings on constitutional grounds. Noting that review of such questions is available by writ of certiorari in the United States Supreme Court, see *In re Summers*, 325 U.S. 561, 566, 65 S.Ct. 1307, 1310, 89 L.Ed. 1795 (1945), the courts have refused to permit collateral challenges to those

[27] The language emphasized above is that which was deleted from that sentence by plaintiff's counsel in quoting it in the brief. See Plaintiff's Brief in Response, at 26a.

proceedings under the Civil Rights Acts. In *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), the Court of Appeals for the Tenth Circuit states:

> This action is, in essence, an attempt by Doe to seek review in inferior federal courts of the *entire* state proceedings including the order of the Colorado Supreme Court refusing to grant his second application for admission. That function is one reserved exclusively to the United States Supreme Court. . . .
>
> Doe cannot invoke the provisions of §1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review of the United States Supreme Court.

Id., 550 F.2d at 599 (emphasis in original; citations omitted).

The Court of Appeals for the Fifth Circuit has similar words for a civil rights suit brought by a Florida lawyer to challenge his three-month suspension from practice:

> Among the several answers to plaintiff's claim,a basic and dispositive one is that we hold no warrant to review final judgments of the Florida Supreme Court. That power is reserved to the Supreme Court of the United States. Complaining of constitutional violations, Mr. Sawyer has cast his complaint in the form of a civil rights suit. What he seeks, however, is simply reversal of the state court judgment. We have scrutinized the state proceedings and find them to be manifestly judicial ones. They could have been reviewed in the Supreme Court. *In re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945). Mr. Sawyer has boarded the wrong flight.

Sawyer v. Overton, 595 F.2d 252 (5th Cir. 1979) (per curiam). As expressed by the Court of Appeals for the First Circuit, "The settled law, with which we agree, is 'that disciplinary orders of the highest court of a state may be reviewed federally only in the Supreme Court by petition for certiorari and not by suits in the district courts.' " *Martinez*

Rivera v. Trias Monge, 587 F.2d 539, 540 (1st Cir. 1978), quoting *Grossgold v. Supreme Court of Illinois*, *557 F.2d 122, 125 (7th Cir. 1977)*. *The Grossgold* court observes:

> If no court could review the constitutional question, the alleged constitutional deprivation could be redressed in district court under the Section 1343(3) [civil rights] subject matter jurisdiction grant. If indeed judicial review of a claimed constitutional deprivation were cut off entirely, grave constitutional practices would be posed. Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362 (1953). The flaw in plaintiff's contentions is that it overtakes the judicial review already accorded him. The Illinois Supreme Court, which is fully competent to pass on federal constitutional questions, has passed upon this constitutional question, and its decision became final when the Supreme Court of the United States denied certiorari. . . .
>
> *Consequently there was no agruable constitutional "deprivation" upon which Section 1343 could operate to provide subject matter jurisdiction.* The doctrine of *res judicata* bars any further litigation of this question.

Id., 557 F.2d at 124-125 (emphasis added).[28]

Like the plaintiff in *Grossgold*, Martinez had available the remedy of appeal, in his case to the United States Court of Appeal for the Tenth Circuit and the Supreme Court.

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[28] 28 U.S.C. §1343(a)(3) provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> xxxx; xxxx [sic]
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; xxx xxx

See also *Martinez Rivera v. Travis Monga*, *supra*, 587 F.2d at 540 n*.

Unlike the plaintiff in *Grossgold*, Martinez *prevailed* on the material constitutional question he raised in that appellate forum.

These cases reflect the general approach taken by the courts in foreclosing the use of the civil rights acts as a means of collateral attack seeking compensation or other relief for judicial error or misconduct when review by direct appeal is available. See *e.g.*, *Wilkins v. Rogers*, 581 F.2d 399, 404 (4th Cir. 1978);[29] *Givner v. Oman*, 459 F.Supp. 436, 439 (D.N.M.1977). In *Almon v. Sandlin*, 603 F.2d 503 (5th Cir. 1979), the court noted that "[a]lthough Almon has styled his complaint in the form of a civil rights action seeking monetary damages for alleged constitutional violations, this action is patently an attempt to collaterally attack the validity of the final judgment of the Supreme Court of Alabama." *Id.*, 603 F.2d at 506. If Almon had asserted his constitutional grievances in the challenged proceedings, "his proper remedy for an unfavorable decision was to seek review by writ of certiorari to the Supreme Court of the United States, not by collaterally attacking the judgment in a federal district court under §1983." *Id.*[30]

The same principle has been applied to civil rights suits which challenge the validity of criminal convictions or punitive confinement. In *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court held that the 42 U.S.C. §1983 was not available to prisoners seeking to collaterally attack the fact or duration of their

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[29] In *Wilkins* the court observes:

> The record demonstrates that Wilkins is simply dissatisfied with the results in the state court proceedings to date. If she remains dissatisfied at the conclusion of those proceedings, she may avail herself to South Carolina's appellate remedies. We therefore affirm the district court's decision not to intervene [under the Civil Rights Acts].

[30] Though many of these cases involve civil rights suits against state rather than federal courts, (which is understandable because of the "under color of state law" element of a §1983 action), the logical underpinnings of these decisions as expressed in *Grossgold*, for example, seem equally relevant to actions against federal courts.

confinement. The Court found that the writ of *habeas corpus* was the sole means of raising such a challenge.[31] *Id.*, 411 U.S. at 498-500, 93 S.Ct. at 1840-1841. Prisoners may maintain damages actions under the Civil Rights Act, but "[i]f a state prisoner is seeking damages he is attacking something other than immediate or more speedy release — the traditional purpose of habeas corpus." *Id.*, 411 U.S. at 494, 93 S.Ct. at 1838. An attack on "the fact or length of confinement" comprehends assertions that the plaintiff "was denied his constitutional rights at trial, as in *Johnson v. Zerbst*, [304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)]." *Id.*, 411 U.S. at 486, 93 S.Ct. at 1834. For federal prisoners, 28 U.S.C. §2255 provides a means equivalent to habeas corpus for raising collateral attacks on federal criminal convictions. *Davis v. United States*, 417 U.S. 333, 344, 94 S.Ct. 2298, 2304, 41 L.Ed.2d 109 (1974); *United States v. Hayman*, 342 U.S. 205, 217, 219, 72 S.Ct. 263, 271, 272, 96 L.Ed. 232 (1952). Plaintiff's post-conviction remedies, had he been convicted, would have been a direct appeal and, if appropriate standards were met, relief under §2255. Judicial error or misconduct that is prejudicial to a criminal defendant may readily be raised upon a direct appeal. Jurisdictional, constitutional and some non-constitutional[32] errors may be redressed under §2255. See *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962); *United States v. Adonizio*, 450 U.S. 178, 185-186, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979).

Plaintiff herein cites no authority which finds that federal prisoners have available the additional collateral remedy of a civil rights damages action against the courts,

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[31] In *Preiser*, "respondents' counsel acknowledged at oral argument that a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus." *Id.*, 411 U.S. at 489, 93 S.Ct. at 1836. *Preiser* dealt with additional confinement administratively imposed through cancellation of good-time credits.

[32] In *Davis v. United States*, *supra*, the court commented that "[t]his is not to say, however, that every asserted error of law can be raised on a §2255 motion." *Id.*, 417 U.S. at 346, 94 S.Ct. at 2305. Rather the inquiry is whether the asserted nonconstitutional error "inherently results in a complete miscarriage of justice" and "present[s] exceptional

judges or prosecutors involved in their conviction.[33] In fact, §1983 actions of this kind have been forbidden even in the absence of the availability of habeas corpus or §2255 relief. See *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138, 142 (7th Cir. 1980); *Hanson v. Circuit Court of the First Jud. Cir.*, 591 F.2d 404, 410-411 (7th Cir. 1979), *cert. denied* 444 U.S. 907, 100 S.Ct. 220, 62 L.Ed.2d 143; *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978); *Lathon v. Parish of Jefferson, 358 F.Supp. 558, 560 (E.D.La. 1973)*.[34]

The courts have repeatedly emphasized that "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947); *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087,

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circumstances' that justify collateral relief under §2255." *Id.*, 417 U.S. at 346-347, 94 S.Ct. 2305; see also *United States v. Addonizio*, 442 U.S. 178, 185, 99 S.Ct. 2235, 2240, 60 L.Ed.2d 805 (1979).

[33] While prisoners may bring civil rights damages suits which are addressed to appropriate subject matter, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); 42 U.S.C. §1997e, does that right encompass an attack on prior trial proceedings? "[T]he cases holding that judges and prosecutors have an absolute immunity in damage actions brought under §1983 . . . may render the problem academic: a damage action attacking a conviction as unconstitutional will virtually always be directed at the state judge or prosecutor and will be subject to a motion to dismiss on immunity grounds." P. Bator, et al., eds., Hart & Wechsler's The Federal Courts and the Federal System, 1981 Supplement, at 419 (1981).

[34] In *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978) the court stated:

> Stripped to the bone, the plaintiff's action under §1983 is little more than a habeas corpus action without a custody requirement. We do not believe that §1983 was meant to be a substitute for habeas corpus when there is no custody . . . Under his theory of §1983, appellant would have us sit in perpetual review of all criminal decisions.

Though the plaintiff in *Cavett* sought declaratory and equitable relief, it seems no more appropriate for a plaintiff to test the asserted errors in a prior criminal trial by seeking damages instead.

60 L.Ed. d 634 (1979); *Davis v. United States*, 417 U.S. 333, 345, 94 S.Ct. 2298, 2304, 41 L.Ed.2d 109 (1974). The courts have also concluded that civil rights suits are not available as a substitute or supplement for the habeas corpus remedy. *Preiser v. Rodriguez, supra; Cavett v. Ellis, supra; Taylor v. Kavanaugh*, 640 F.2d 450, 451 (2d Cir. 1981). As Justice Douglas pointed out in *Sunal v. Large, supra*, "The normal and customary method of correcting errors of the trial is by appeal." 332 U.S. at 177, 67 S.Ct. at 1590. Logic would dictate that a civil rights suit against a presiding judge is likewise not available as a supplement to or substitute for an appeal.[35]

> The Civil Rights Act was not intended to be a source of damage actions brought by disappointed litigants against judicial officers who may commit errors or irregularities while acting within the scope of their authority during the course of state court litigation.

Sarelas v. Sheehan, 326 F.2d 490, 492 (7th Cir. 1963). It is not intended to serve that purpose as to federal litigation either, including criminal prosecutions.[36]

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[35] Such a civil rights suit may be available as a collateral remedy in a very limited class of cases, i.e., those cases in which the court proceedings "have been a complete nullity," *Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1984); *Sarelas v. Sheehan*, 326 F.2d 490, 491 (7th Cir. 1963), in which the judge has acted in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978).

The civil rights action would be maintainable, however, only because the challenged "proceedings" were not judicial proceedings at all. This is consistent with the general theory of collateral attack: "[S]uch an attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exercise of power that way possessed." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496, 53 S.Ct. 721, 727, 77 L.Ed. 1331 (1933) (footnote omitted).

[36] This is not to say that a plaintiff need exhaust his appellate remedy before bringing a civil rights suit against the judge presiding at his criminal trial. Compare *Patsy v. Florida Board of Regents*, ——— U.S. ———, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). It is to say that there will be *no* such suit if the judge was acting with at least some indicia of jurisdiction. *Stump v. Sparkman, supra*.

Nor does a party who has prevailed upon a criminal appeal have an action to exact damages from those who have erred.[36a] Again recalling *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967), and the court's comment therein that a judge's errors "may be corrected on appeal but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice and corruption," it seems clear that the High Court has rejected any theory of qualified immunity for judges and prosecutors. To premise a judge's official immunity from suit upon the absence of error or even malice in his actions is to destroy it.

> Absolute immunity, as the Supreme Court has acknowledged, leaves the genuinely wronged person without civil redress. However, broader societal concerns dictate that the balance be struck in favor of freeing judges from the constant fear of retaliatory suits. The alternative of qualified immunity, or no immunity at all, would disserve the public interest, because these officials would still be subject in some degree to vexatious litigation.

Sellars v. Procunier, 641 F.2d 1295, 1300 (9th Cir. 1980).

The multitude of cases referred to by plaintiff's counsel in support of the contrary view, Hrg. Tr. at 53-54, have simply failed to materialize. Cases like *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), have permitted private actions for damages, but have done so in relation to events wholly extrinsic to the conduct of a criminal trial.[37]

[36a] Indeed, the Judicial Code expressly provides a damages remedy for persons unjustly convicted and imprisoned. That claim must be made against the United States in the Court of Claims. 28 U.S.C. §§1495, 2513 (1976).

[37] In cases in which the proceedings reach the trial stage and allegations of illegal search and seizure like those in *Bivens* are determined adversely to the defendant, he is barred (by the doctrine of *res judicata*) from maintaining a collateral *Bivens*-type action against the officers involved. See *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

At hearing, counsel for the plaintiff cited *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), for the proposition that "[a] judge is not immune who flouts the Constitution to get a conviction and who conspires with the police to railroad a defendant." Hrg. Tr. at 49-50. The action in *Gregoire* also was against officials of the federal executive branch and alleged a claim for false arrest. There was no judicial defendant. In *Gregoire*, the court held the officials to be absolutely immune from suit, not withstanding the fact that "their unlawful acts had been induced only by personal ill-will." *Id.*, 177 F.2d at 579. *See also Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *affirmed* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1928). The court in *Gregoire* emphasized the important policy served by the defense of absolute immunity:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Id., 177 F. 2d at 581 (Learned Hand, C.J.).[38]

The plaintiff assails the application of the absolute

[38] Counsel for plaintiff at hearing and in the brief has also cited *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir. 1945) as authority permitting the maintenance of an action such as this under the Civil Rights statutes. *E.g.*, Hrg. Tr. at 49. The *Picking* opinion was *expressly overruled* by the United States Court of Appeals for the Third Circuit sitting *en banc* in *Bauers v. Heisel*, 361 F.2d 581, 584 (3d Cir. 1961). The holding in *Bauers*

immunity doctrine in this case because of the peculiar posture of the *Martinez* case. In *Martinez*, the Government appealed from Judge Kane's dismissal of the attempted retrial of the plaintiff on the non-severed original three counts of the indictment. The plaintiff prevailed in that appeal on his claim that double jeopardy barred such retrial based on the failure of the prosecutors to disclose the nature of the January 29 meeting to the defense at the time that a mistrial motion was agreed upon. *Id.*, 667 F.2d at 890. The Court of Appeals, however, did not have occasion to reach the plaintiff's other allegations of trial court error and judicial misconduct.[39]

The immunity defense aside, the argument that a civil action for damages is needed to redress such problems following declaration of a mistrial misapprehends the nature of a mistrial.

> The declaration of a mistrial renders nugatory all trial proceedings with the same result as if there had been no trial at all. See 58 C.J.S. Mistrial at 833-834 (1948). The situation which exists is analogous to that which results from an appellate reversal and remand for new trial. . . . The parties are returned to their original positions and, at the new trial, can introduce new evidence and assert new defenses not raised at the first trial. See, *e.g.*, *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243, 78 S.Ct. 245 [251] 2 L.Ed.2d 234 (1957); . . .

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was consistent with and cited by the Court in *Pierson v. Ray*, *supra*, 386 U.S. 547, 555 n. 9, 87 S.Ct. 1213, 1218 n. 9, 18 L.Ed.2d 288 (1967).

Counsel is reminded of the hazards that accrue from reading opinions in isolation from each other. See also DR 7-106, ABA Code of Professional Responsibilities.

[39] At hearing, counsel for plaintiff stated that "if it is a matter correctable on appeal, it is within the judicial function and it is immune. If it is a matter that can't be reached by any appellate review, it is not within the official immunity." Hrg. Tr. at 37-38.

The existing case law on absolute immunity expresses no such "bright-line" distinction.

United States v. Mischlich, 310 F.Supp. 669, 679 (D.N.J. 1970) (citations omitted).

Following Judge Winner's mistrial determination, the plaintiff's liberty was no longer at risk as a consequence of any of the alleged errors or misconduct which preceded it. As to the three counts mistried, the only cloud upon the plaintiff's freedom was the threat of retrial, which dissipated upon an interlocutory appeal. See *United States v. Martinez, supra*. The errors of the first trial, whether intentional or not, have been rendered a nullity. There remains no threat of prejudice to the defendant's rights posed by the conduct of that trial.[40] No practical purpose would be seved by a present judicial finding of what was error, or what was not.

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[40] Isn't the injury likely to be occasioned by trial error the potentially improper deprivation of one's liberty?

The injuries claimed by Martinez as a result of the January 1981 proceedings, ie., the expense, the emotional strain, the exposure and potential stigma, are costs which are inseparable from those obtaining from being the defendant in a perfectly conducted criminal trial. Constitutional due process does not guarantee a perfect trial. See *e.g., Michigan v. Tucker*, 417 U.S. 433, 446, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974).

This is not in any way intended to minimize the importance of adjudicating proceedings with as little error as possible. "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2184, 2826, 65 L.Ed.2d 973 (1980) (Burger, C. J.) Judges should do the best work that they can.

Trial judges do not, however, personally insure any party a perfect proceeding, or even one that the appellate courts find "error free." Plaintiff cites no case holding a judge presiding over a mistrial liable to the parties for the costs and stresses litigation. These are "precisely the alleged injuries" for which *Pierson* and related cases grant absolute immunity. *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir. 1980). They are the cost exacted by a system that entitles people to a fair trial before any punishment is considered. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866). "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L.Ed. 783 (1940).

At hearing, counsel for the plaintiff spoke of the perceived need to reach that error and misconduct not passed upon by the Court of Appeals:

> MS. GRAHAM: . . . Perhaps the complete correction or certainly for the plaintiff's purposes might have been a censure of Judge Winner and the prosecutors. If the judicial council or the Circuit Court and so forth had taken that step or the Bar Association Disciplinary Committee, I believe the plaintiff probably would have been satisfied with that. But those things didn't happen and that's another reason that he brought this action for violation of his rights because he'd like to stop this kind of thing from going on again.

Hrg. Tr. at 58. The Court of Appeals has repeatedly stated that "the Civil Rights Act, of course, was not enacted to discipline local law-enforcement officials." *Stringer v. Dilger*, 313 F.2d 536, 540 (10th Cir. 1963); *Clappier v. Flynn*, 605 F.2d 519, 532 (10th Cir. 1978); *Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976). Nor can it be said that to have been enacted for the discipline of federal judges.[41] Other such procedures are available in dealing with the judiciary. See R. Berger, Impeachment: The Constitutional Problems 122-180 (1973); 28 U.S.C. §372(c) (1981 Supp.) (Judicial Council complaint procedure re: Judges); *Center for the Independence of Judges and Lawyers of the United States, Inc. v. Mabey*, 19 B.R. 635, 645 (D.C.D.Utah 1982). Where both Constitution and Congress have provided for specific remedies, extension of the Civil Rights Act, or of *Bivens*-type actions this far afield would be manifestly

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[41] As the Court of Appeals has observed,

> [T]he immediate occasion for the adoption of this litigation was the post Civil War conditions primarily in the southern states. Blacks and Union sympathizers were persecuted by the Ku Klux Klan and they did not receive the protection of state laws and state law enforcement agencies.

Wells v. Ward, 470 F.2d 1185, 1187 (10th Cir. 1972); accord, *Monroe v. Pape*, 365 U.S. 167, 171-187, 81 S.Ct. 473, 475-484, 5 L.Ed.2d 492 (1961); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 665-689, 98 S.Ct. 2018, 2022-2035, 56 L.Ed.2d 611 (1978).

unwarranted. Cf. *Preiser v. Rodriguez*, 411 U.S. 475, 489-490, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973).

As an additional ground for seeking relief, the plaintiff urges that the effect of the mistrial determination was to deprive him of his entitlement to a "name clearing hearing," i.e., a completed trial which would by acquittal erase any taint of wrongdoing inferable from the fact of indictment. See Hrg. Tr. at 96-97. The mistrial and the resulting double jeopardy bar has precluded the original jury—or any jury—from reaching a verdict of innocence or guilt. Martinez now seeks vindication through a civil rights action against those who allegedly precipitated the mistrial prior to verdict.

The United States Supreme Court has often spoken of "a defendant's valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), and the constitutional significance of that right in relation to other values. See e.g., *Oregon v. Kennedy*, —— U.S. ——, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *United States v. Scott*, 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978); *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978); *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 1078, 47 L.Ed.2d 267 (1976) *United States v. Jorn*, 400 U.S. 470, 484-485, 91 S.Ct. 547, 556-557, 27 L.Ed.2d 543 (1971) (opinion of Harlan, J.); *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034, 10 L.Ed.2d 100 (1963). "[T]he interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one . . . ." *Illinois v. Somerville*, 410 U.S. 458, 471, 93 S.Ct. 1066, 1073, 35 L.Ed.2d 425 (1973).

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of

> such unfairness to the defendant exists whenever a trial is abated before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require the accused to stand trial.

Arizona v. Washington, 434 U.S. at 503-505, 98 S.Ct. at 829-830 (footnotes omitted); see also *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Judicial recognition of this "valued right" is embodied in the application of the Double Jeopardy Clause to bar the retrial of a defendant under a number of circumstances.

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," *United States v. Jorn*, *supra*, [400 U.S.] at 485 [91 S.Ct. at 557], threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum v. United States*, 372 U.S. [734] at 736 [83 S.Ct. 1033 at 1034, 10 L.Ed.2d 100]. . . .

United States v. Dinitz, 424 U.S. at 611, 96 S.Ct. at 1081 (citations omitted). See also *Oregon v. Kennedy*, ——— U.S. ———, ———, 102 S. Ct. 2083, 2088, 72 L.Ed.2d 416 (1982).[42]

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[42] A fair reading of *Dinitz* and *Oregon v. Kennedy* would lead one to conclude the reprosecution of Martinez would have been barred under the Double Jeopardy Clause because of Judge Winner's conduct alone, particularly when viewed through the historical lens:

> Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this "abhorrent" practice.

Arizona v. Washington, 434 U.S. 497, 507-508, 98 S.Ct. 824, 831, 54 L.Ed.2d 717 (footnotes omitted).

However, the "valued right" does not translate into a constitutional entitlement to retry a criminal charge in a civil proceeding, or a right to seek damages from those who may have placed fairness ahead of finality in declaring a mistrial.[43]

A defendant who raises the bar of the Double Jeopardy Clause against retrial avoids the risks and burdens of defending a second prosecution for the same offense. As against that charge, the defendant retains his liberty without further shadow of doubt. He retains his liberty, however, at the cost of not knowing the outcome of the second trial which will never take place. In asserting the double jeopardy defense a defendant chooses freedom in lieu of an opportunity for vindication or conviction by verdict.

Some stigma certainly attaches to one accused of criminal wrongdoing. A defendant, however, is not left hopelessly harmed by a double jeopardy bar.

The long-standing presumption that a person remains innocent until proven guilty in a court of law finds firm recognition in American constitutional law as an essential element of due process. See *Taylor v. Kentucky*, 436 U.S. 478, 483-486, 98 S.Ct. 1930, 1933-1935, 56 L.Ed.2d 468 (1978); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895). Aside from its constitutional moorings, the presumption of innocence is grounded in a great deal of common sense. Allegations of criminal conduct are best resolved by a reasoned deliberation upon all of the appropriate evidence.

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[43] A court may declare a mistrial even over the defendant's objections where a "manifest necessity" appears for doing to, it "the ends of justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824); *Oregon v. Kennedy*, *supra*, ——— U.S. ———, ———, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416 (1982).

The "first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974), if there has indeed been falsehood or error. The plaintiff is free to hire a hall and proclaim his innocence to all who care to hear.

By itself, however, the fact that one's indictment for crime may leave one vulnerable to unfavorable public exposure is one cost, one risk, that we all bear as members of a society that guarantees an open system of public trials as part of its most fundamental law. See Amend. 6, U.S. Const.; *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). It is not a cost for which a court, a judge, or a prosecutor owe a defendant indemnity in dollars.

As against those beyond the courthouse doors who would falsely defame the accused, the law of torts provides appropriate relief. See *e.g., Gertz v. Robert Welch, Inc., supra;* W. Prosser, Law of Torts §§111-116 (4th ed. 1971). No case cited in the plaintiff's 46-page brief even suggests that the inconclusiveness of a mistrial or double jeopardy bar may be properly abated through a collateral civil action against the presiding "judge," nor could this Court locate such authority.[44]

While in other circumstances "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). Here the bar of

[44] While the common-law action for malicious prosecution provides a civil remedy against wholly groundless actions brought by prosecutors, an essential element of that tort is the conclusion of the subject proceedings in the defendant's favor. See W. Prosser, Law of Torts §119 at 838-840 (4th ed. 1971).

double jeopardy forecloses further prosecution; "what the government is doing to" the defendant is forcefully halted, as is his right to a trial thereon. That trial, or retrial, is the opportunity to hear and be heard that is guaranteed by the Constitution. Compare *Reilly v. Leonard*, 459 F.Supp. 291, 301 (D.Conn. 1978).

The plaintiff's claims against Judge Winner fail in other respects as well. The complaint's averments regarding the Judge's plans for courtroom "hidden camera" surveillance remind one of the dilemma posed when one tries to falsely imprison a sleeping man. Contemporaneous knowledge of restraint by the one confined is an essential element of the false imprisonment cause of action. See Restatement (2d) of Torts §42. Likewise, the plaintiff asserts that he and his defense attorneys were intimidated by plans for hidden cameras, plans of which they were totally unaware. Plaintiff's counsel concedes that Judge Winner's motions about hidden cameras "did not actually harm plaintiff. . ."[45] but argues that the issue of harm is not relevant to consideration of a Rule 12(b)(6) motion. Hrg. Tr. at 40.

The question of harm or "injury in fact" is a preliminary inquiry in every case or controversy making its way into the federal courts. A plaintiff's standing to sue is premised upon some personalized injury to his or her legally cognizable interests. See *e.g.*, *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed. d 595 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218, 220-221, 94 S.Ct. 2925, 2930, 2931-2932, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 179-180, 94 S.Ct. 2940, 2947-2948, 41 L.Ed.2d 678 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493, 94 S.Ct. 669, 674, 38 L.Ed.2d 674 (1974); *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-2326, 33 L.Ed.2d 154 (1972)

[45] Plaintiff's Brief in Response at 21.

("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objectives harm or a threat of specific future harm."); *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1608, 60 L.Ed.2d 66] (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." [sic] *Valley Forge Christian College v. Americans United for Separation of Church and State*, —— U.S. ——, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); (footnote omitted). This Court, therefore, may — indeed, *must* — inquire of the justiciability of an action or claim brought before it, including inquiry into the standing of the party to bring it. See *Citizens Concerned for Separation of Church and State v. City of Denver*, 628 F.2d 1289, 1294-1301 (10th Cir. 1980), *cert. denied* 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975; *Western Mining Council v. Watt*, 643 F.2d 618, 623-624 (9th Cir. 1981).

A plaintiff must allege some injury to himself occurring from a judge's conduct in order to maintain any action against the judge. See *Center for the Independence of Judges and Lawyers of the United States, Inc. v. Mabey*, 19 B.R. 635, 645 (D.C.D.Utah 1982).

A civil rights complaint may speak no more hypothetically than may any other action. 42 U.S.C. §1983 refers to liability for subjecting or causing to be subjected any citizen or other person to the deprivation of his or her federal rights, not for the mere possibility of deprivation. 42 U.S.C. §1985(3) looks to conspiratorial acts "whereby another is injured in his person or property, or deprived" of his civil rights, but does not reach the mere contemplation of

such acts. In *Bivens*-type actions, "a plaintiff seeking a damage remedy under the Constitution must first demonstrate that the constitutional rights have been violated." *Davis v. Passman*, 442 U.S. 228, 248, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979). As the Supreme Court recently held, "[t]he first inquiry in any §1983 suit is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' " of the United States. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979); *Martinez v. California*, 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L.Ed.2d 481 (1980).

Aside from alleging no injury to the plaintiff, the complaint alleges no overt act in furtherance of the purported "hidden camera" conspiracy that infringed on anyone's federally protected rights. "[I]nfringement of some federally protected right independent of §1985(3) is required for a violation of conspiracy statute to be demonstrated." *Holmes v. Finney*, 631 F.2d 150, 154 (10th Cir. 1980).[46]

Plainly the complaint fails to state a cognizable claim in reference to the hidden camera discussion.

The plaintiff's claims that the judge has somehow defamed him face similar difficulties. Defamation *per se* is not a violation of the civil rights laws, or the Constitution. See *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). The complaint does not expressly seek damages for common-law slander or libel. Nor does the complaint spell out with any degree of particularity the "false and damaging matter" allegedly published by Judge Winner. Complaint ¶¶112-122.[47] To the extent that the complaint makes general reference to Judge Winner's official

[46] In *Holmes*, the Court of Appeals also held that "a plaintiff's claim under . . . §1981, must be grounded on the violation of a right of substance and not merely on a theoretical speculation that some right has been infringed." *Id.*, 631 F.2d at 154.

[47] At hearing, counsel was at a total loss in identifying any false or defamatory statements made by the judge or other defendants in the media. See Hrg. Tr. at 40-43. The single item pointed to in the complaint

communications to other judges and officials, it reaches matters clothed with immunity. See *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Barr v. Mateo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Spalding v. Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896).

The complaint further fails to allege how the unspecified statements transgress any clearly established constitutional rule.[45] It thus wholly fails to state a common-law or constitutional claim for which relief may be granted.

Finally, the plaintiff seeks to recover damages from defendant Winner because of Winner's evil intent in presiding at the trial. The complaint alleges that he was biased and prejudiced toward the plaintiff, and that he sought to "railroad" him to jail. Complaint, ¶¶63-64.

Had the *Martinez* case been completed, and a verdict adverse to the plaintiff been rendered, I suppose the proper question on appeal would have been whether "the judge's bias infected the entire trial." *Sheppard v. Maxwell*, 384 U.S. 333, 358 n. 11, 86 S.Ct. 1507, 1519 n. 11, 16 L.Ed.2d 600 (1966). It never reached that stage, however, and that question is as much a nullity at this point as the other averments of trial error. Mootness aside, the claim embraces obviously "judicial" conduct which is guarded from suit by the absolute immunity doctrine. "Evil intent is not a sufficient element for piercing judicial immunity: '[a] judge will not be deprived of immunity because the action he

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a letter sent by Judge Winner to the Justice Department and circulated to other judges, is not even alleged to nor been published by the defendant. See complaint, at ¶¶114, 116. See also Hrg. Tr. at 147-150.

[45] Even if one is asserting that the purported "false matter" was disseminated in furtherance of a conspiracy to deprive plaintiff of his civil rights, the complaint must allege how the plaintiff's federally protected rights have been harmed. *Holmes v. Finney*, *supra*, 631 F.2d at 154.

Cases such as *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), which dealt with a public and private campaign by a judge to vilify a city official, involve liability for conduct outside of the judicial function, and are therefore inapposite.

took . . . was done maliciously . . .' *Stump v. Sparkman*, *supra*, 435 U.S. at 356, 98 S.Ct. at 1104." *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (9th Cir. 1981); *Cadena v. Perasso*, 498 F.2d 383, 384 (9th Cir. 1974).[49]

In summary, the actions and conduct by Judge Winner which plaintiff alleges and about which he complains are actions which were intrinsically "judicial" in nature,[50] and thus call into question the doctrine of absolute judicial immunity. Neither actions under the Civil Rights Act nor *Bivens*-type actions asserted directly under the Constitution have been extended so far as to reach beyond the bar of judicial immunity and expose a judge to civil liability for actions taken with something more than a "clear absence of all jurisdiction." *Stump v. Sparkman*, *supra*, 435 U.S. at 356-357, 98 S.Ct. at 1104; *Pierson v. Ray*, *supra*, 386 U.S. at 554-555, 87 S.Ct. at 1217-1218; *Butz v. Economou*, *supra*, 438 U.S. at 508-514, 98 S.Ct. at 2911-2914. Judge Winner was acting well within his jurisdiction when the actions

[49] Certainly "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.ed. 942 (1955). Where a judge has prejudged an issue upon which he is the trier of fact, he should appropriately disqualify himself. *United States v. Sciuto*, 531 F.2d 842, 844-846 (7th cir. 1976); see also *United States v. Grinnell Corp.*, 384 U.S. 563, 580-583, 86 S.Ct. 1698, 1708-1710, 16 L.Ed.2d 778 (1966). Parties in a case may bring any such problem to the court's attention pursuant to the Judicial Code, see 28 U.S.C. §144 (1976); *Berger v. United States*, 255 U.S. 22, 32-33, 35-36, 41 S.Ct. 230, 232-233, 233-234, 65 L.Ed. 481 (1921), and may raise it on appeal. *In re Murchison*, *supra*.

[50] Plaintiff repeatedly avers that the defendant sought to "railroad" him to jail. A carefull search through the indexes of works such as W. Prosser, Law of Torts (4th ed. 1971), the Restatements of Torts Harper and James, Law of Torts (1956), Pollock, The Law of Torts (1939), and L. Green, et al., Cases on the Law of Torts (2d ed. 1977) discloses no reference to a constitutional or common-law tort known as "railroading." See also Whitman, "Constitutional Torts," 79 *Mich.L.Rev.* 5 (1981). Turning to Webster's Third New International Dictionary (1971), one finds that to "railroad" may mean "to convict and send esp. to prison with undue haste and [usually] by the use of false charges or insufficient evidence." *Id.*, at 1876; accord, The Random House College Dictionary 1091 (rev. ed. 1980). Were "railroading" to be granted the status of a distinct cause of action in

complained of were taken. None of the arguments advanced by the plaintiff carry sufficient weight in authority or reasoning to overcome the bar of judicial immunity.

Additionally, some claims lack sufficient specificity to state a cognizable cause of action; others lack even the bare but essential allegation that the plaintiff suffered injury in fact as a result of the defendant's purported wrongdoing. The complaint as against Judge Winner must therefore be dismissed for failure to state a claim upon which relief may be granted.[51]

The plaintiff's claims for declaratory relief are likewise dismissed for failure to state a claim for which relief may be granted. The question in each case under the Declaratory

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tort law, its elements might well be defined by the case of *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980). In *Lopez*, the judge defendant, acting in the capacity of a private rent-collector, secured the arrest of an evicted tenant, Lopez, who had been found once more within his former premises. The judge accompanied Lopez to the police station, called the landlord to the station to sign a complaint, drafted the charging documents and signed the arrest warrant. He then made entries on a standard plea form indicating that Lopez had waived trial by jury and had pleaded guilty. He then sentenced the "defendant" to jail for 240 days. Lopez had thus been charged, arraigned,convicted and sentenced *in absentia* by the judge in the booking area of the police station. *Id.*, 620 F.2d at 1232.

The Court of Appeals for the Seventh Circuit, itself referring to the described conduct as an effort to "railroad" the plaintiff, *id.*, 620 F.2d at 1237, held the judge defendant to be liable for those unlawful acts which were prosecutorial in nature, but not for those which were "judicial" in nature. *Id.*, 620 F.2d at 1234, 1235.

Lopez v. Vanderwater harmonizes with the observation in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." Indeed it would, but the *Martinez* case is not the *Lopez* case. No such effort by Judge Winner to "railroad" the plaintiff is made out in this complaint.

[51] To the extent that the plaintiff's commonlaw tort claims are to be read as pleaded against Judge Winner, they also are dismissed upon the same grounds.

Judgment Act, 28 U.S.C. §§2201, 2202 (1976) is whether the facts alleged under the existing circumstances present a real controversy between parties having adverse legal interests of such immediacy and reality as to warrant a declaratory judgment. See *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); C. Wright, Law of Federal Courts §100 at 498 n. 6 (3d ed. 1976). "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Press v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 581, 7 L.Ed.2d 604 (1962) (per curiam); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494, 499, 62 S.Ct. 1173, 1175, 1177, 86 L.Ed. 1620 (1942); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 299-300, 63 S.Ct. 1070, 1073-1074, 87 L.Ed. 1407 (1943); *Mechling Barge Line v. United States*, 368 U.S. 324, 331, 82 S.Ct. 337, 341, 7 L.Ed.2d 317 (1961). "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S.Ct. 641, 644, 92 L.Ed. 784 (1948).

A collateral attack on a presiding judge's conduct of a criminal trial through the device of a civil suit proves no more appropriate because the defendant-turned-plaintiff seeks declaratory relief rather than damages. In *Hanson v. Circuit Court of First Jud. Cir.*, 591 F.2d 404, 409 (7th Cir. 1979), discussed above, a declaratory judgment action was held to be an inappropriate alternative to habeas corpus in attacking a judgment of conviction. It seems even more inappropriate here where nothing so potentially prejudicial as a criminal conviction has been imposed on the complaining party. See also *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978).

A declaration of mistrial is not a final disposition of an action. Rather, it is the nullification of the first trial of an action and the premise for the commencement of a second trial. One may not appeal as a matter of right from a

mistrial, even where a judge has also denied a motion for judgment of acquittal which, if well-taken, would bar a retrial. See *Esneault v. Waterman S. S. Corp.*, 449 F.2d 1296 (5th Cir. 1971); *United States v. Kaufman*, 311 F.2d 695, 698-699 (2d Cir. 1963); *Gilmore v. United States*, 264 F.2d 44, 47 (5th Cir. 1959). Permitting declaratory judgment actions in this context would permit collateral attack on a trial court's rulings even before they are ripe for direct appeal. "The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick v. United States*, 309 U.S. 323, 325-326, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1948); see also *Abney v. United States*, 431 U.S. 651, 662-663, 97 S.Ct. 2034, 2041-2042, 52 L.Ed.2d 651 (1977); *Wilkinson v. United States*, 601 F.2d 791 (5th Cir. 1978); *Gilmore v. United States*, *supra*; *United States v. Becton*, 498 F.Supp. 1013, 1019-1025 (S.D.Tex. 1980). A mistrial declaration postpones the possibility of conviction until a retrial, if indeed there will be one. Cf. *Oregon v. Kennedy*, —— U.S. ——, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

A mistrial declaration often reflects a determination by the court that the proceeding has become infected by prejudicial error, whatever the error may be. See e.g., *Arizona v. Washington*, 434 U.S. 497, 510-517, 98 S.Ct. 824, 832-836, 54 L.Ed.2d 717 (1978).[54] A declaratory judgment here finding that which has already been found is needless.

Finally, as the Court of Appeals for the Eighth Circuit observed in a similar case,

> Thus, we are not presented with a case in which declaratory judgment will serve some purpose, such as the declaration of the unconstitutionality of certain specifically enumerated statutes authorizing the complained of action. . . . Rather, from the face of the pleadings, we conclude that the declaratory relief

[54] Plaintiff nowhere asserts that the court's finding of sufficient error to justify a mistrial in *Martinez* was wrong. Compare *McNeal v. Hallowell*, 481 F.2d 1145, 1152 (5th Cir. 1973).

> portion of plaintiff's prayer is no more than an implicit predicate to his request for damages. Since we have previously found Judge Ahlgrimm to be immune from the damage claim asserted, we fail to ascertain any remaining case or controversy to be resolved by declaratory judgment.

Hansen v. Ahlgrimm, 520 F.2d 768, 770 (8th Cir. 1975) (citation omitted).

The plaintiff's claims for equitable relief are also dismissed for failure to state a claim, but upon somewhat different grounds. In the prayer for relief of each of the complaints [sic] 22 counts, plaintiff asks for "an injunction against continued conduct by the named and unnamed defendants of a similar nature."

Though the Supreme Court has "never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts," *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641 (1980), it does not follow that a complaint for injunctive relief may survive a Rule 12(b)(6), no matter how broadly it is worded. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507, 79 S.Ct. 948, 954, 3 L.Ed.2d 988 (1959).

"[H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy." 11 C. Wright & A. Miller, Federal Practice and Procedure §2942, at 368-369 (1973). As explained years ago by Justice Baldwin:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford

> an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: . . . It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.

Bonaparte v. Camden, 3 Fed.Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617). To secure issuance of injunctive relief, a plaintiff "must demonstrate that there is a real danger that the act complained of actually will take place. There must be more than a mere possibility or fear that the injury will occur." 11 C. Wright & A. Miller, Federal Practice & Procedure §2942 at 369 (1973). An injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *State of Connecticut v. Commonwealth of Massachusetts*, 282 U.S. 660, 674, 51 S.Ct. 286, 291, 75 L.Ed. 602 (1931); see also *General Fireproofing Co. v. Wyman*, 444 F.2d 391 (2d Cir. 1971).

> The power to grant injunctive relief should never be exercised merely to assuage fears of what may happen in the future.

Roseboro v. Fayetteville City Board of Education, 491 F.Supp. 110, 112 (E.D. Tenn. 1978); see also *Continental Banking Co. v. Woodring*, 286 U.S. 352, 367-369, 52 S.Ct. 595, 600, 76 L.Ed. 1155 (1932).

> We must protect that which is protectable, but, in so doing, we must limit the use of injunctive relief to situations where it is necessary to prevent immediate and irreparable injury. The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights. . . .

Holiday Inns of America, Inc. v. B & B Corp., 409 F.2d 614, 618 (3d Cir. 1969).

An allegation as to the existence of irreparable injury is "an essential prerequisite for traditional equity jurisdiction." *United States v. American Friends Service Comm.*, 419 U.S. 7, 11, 95 S.Ct. 13, 15, 42 L.Ed.2d 7 (1974) (per curiam); see also *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974); *Boys Markets, Inc. v. Retail Clerks Union, Local 720*, 398 U.S. 235, 254, 90 S.Ct. 1583, 1594, 26 L.Ed.2d 199 (1970); *Detroit News Pub. Ass'n v. Detroit Typo Union No. 18*, 471 F.2d 872, 876-877 (6th Cir. 1972). A complaint which "alleges neither irreparable damages nor the threat of irreparable damages or fact from which it may be concluded irreparable damages may ensue" plainly "does not state a claim for any injunctive relief." *Ogden River Water Users Ass'n v. Weber Basin Water Conservancy*, 238 F.2d 936, 942 (10th Cir. 1956). in *Carter City of Forth Worth*, 456 F.2d 572 (5th Cir. 1972), for example, the court held insufficient a complaint which challenged the Texas constitutional and statutory election laws and sought to prospectively enjoin "any other election" under those provisions.

> But the plaintiffs have not alleged that any particular election is now pending or will be pending at any time in the near future. Irreparable injury, an indispensable ingredient of injunctive relief, is purely speculative at this time and it was purely speculative at the time the federal suit was filed, at least as to unspecified future elections. We therefore hold that the portion of the plaintiff's complaint which looked to "any other election" failed to state a request for injunctive relief that was ripe for constitutional decision, and that the district court had no jurisdiction to grant relief on that portion of the complaint.

Id., 456 F.2d at 576. See also *Chacon v. Granata*, 515 F.2d 922 (5th Cir. 1972), *cert. denied* 423 U.S. 930, 96 S.Ct. 279, 46 L.Ed.2d 258.

The plaintiff herein seeks to enjoin "continued conduct

. . . of a similar nature"[53] to that allegedly engaged in by the defendants at an earlier time. The complaint is barren of any allegation of threatened or imminent irreparable injury; its numerous accusing paragraphs speak in the past tense. As near as one can tell, Martinez is asking this Court to issue a generalized order to the effect of "Don't ever do that again!" — whatever "that" may have been. See also Hrg. Tr. at 45-46.

In that regard, the law is its own injunction, its own approximate body of obligatory rules.[54] Those who serve society as members and officers of its courts owe a solemn duty to respect and uphold those rules and to avoid prejudice to the rights of persons coming into the courts.

The complaint in this case in addressing equitable relief does nothing more than call for an ongoing audit by one federal district judge of the conduct of another. This is manifestly inappropriate, cf. *O'Shea v. Littleton*, 414 U.S. 488, 500-503, 94 S.Ct. 669, 678-679, 38 L.Ed.2d 674 (1974), especially in light of the more specific remedial procedures now available, see 28 U.S.C.A. §372(c) (1982 supp.), and the general supervisory power of the Court of Appeals. See 16 C. Wright, et al., Federal Practice and Procedure §§3932-3936 (1977).[55]

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[53] The complaint technically speaks of "defendants of a similar nature." See Strunk & E. White, The Elements of Style 22 (2d ed. 1972). Injunctions, however, reach particular *conduct*.

[54] Wormuth, "The Dilemma of Jurisprudence," in F. Wormuth, Essays in Law and Politics 5, 13 (Nelson & Sklar, eds. 1978).

[55] Additionally, the Supreme Court has "never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia*, 100 U.S. 339 [25 L.Ed. 676] (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct prescribed by an Act of Congress.' *Gravel v. United States*, 408 U.S. 606, 627 [92 S.Ct. 2614, 2628, 33 L.Ed.2d 583] (1972)." *O'Shea v. Littleton*, *supra*, 414 U.S. at 503, 94 S.Ct. at 679.

Lacking even the bare bones of constitutional or equitable sufficiency, the plaintiff's claims for injunctive relief against Judge Winner must be dismissed. Rule 12(b)(6), Federal Rules of Civil Procedure; *O'Shea v. Littleton, supra*, *Ogden River Water Users Ass'n v. Weber Basin Water Conservancy, supra*; *Carter v. City of Fort Worth, supra*.[36]

VI. CLAIMS AGAINST THE FEDERAL PROSECUTORS

As against former United States Attorney Joseph Dolan,[37] Assistant United States Attorneys Susan Roberts, Jan Chapman, John Barksdale and former Assistant U.S. Attorney Dan Christopher, the material allegations of the complaint seem to be (1) that the federal prosecutors failed to make an adequate independent investigation of the case against the plaintiff before submitting it to the grand jury; (2) that the federal prosecutors participated in a conspiracy with Judge Winner to wrongfully convict and imprison the defendant, or to otherwise violate his civil rights; and (3) that they failed to immediately inform Martinez' defense counsel of the nature and substance of the January 29 meeting with Judge Winner.

[36] Counsel for plaintiff argues that a 12(b)(6) hearing is an inappropriate forum for a discussion of remedies. Hrg. Tr. at 48. Cf. *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284, 288 (2d Cir. 1971). To survive such a motion, the complaint must at least allege the basic requisites of the granting of remedies, esp. when dealing with injunctions. See *Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758, 760, 27 L.Ed.2d 696 (1971); *O'Shea v. Littleton, supra*, 414 U.S. at 502, 94 S.Ct. at 679. A fatally defective complaint is required to be dismissed. *See Curtis v. Utah Fuel Co.*, 59 F.Supp. 680 (D.N.J. 1944), *affirmed* 148 F.2d 340 (3d Cir. 1945), *cert. denied* 326 U.S. 724, 66 S.Ct. 29, 90 L.Ed. 429 (1945). A 12(b)(6) motion tests for the lack of essential requisites and the existence of fatal defects. See 2A Moore's Federal Practice ¶ 12.08 (2d ed. rev. 1982). A complaint stating a *Bivens*-type action "might nevertheless be dismissed under Rule 12(b)(6) unless it can be determined that judicial relief is available." *Davis v. Passman*, 442 U.S. 228, 244, 99 S.Ct. 2264, 2276, 60 L.Ed.2d 846 (1979).

[37] Defendant Joseph Dolan's motion to dismiss on grounds of insufficient service of process, which was argued at the hearing, has since been withdrawn. See Defendant's Withdrawal & Substitution of Defense (July 23, 1982). The substitute defense raised by Dolan has not been considered by this Court.

As against these claims, the U.S. Attorney-defendants raise the defense of absolute immunity and also attack the substantive merit of each allegation.

That prosecuting attorneys are absolutely immune from suit arising out of actions within the prosecutorial function is a question well-settled at common law. In *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), for example, the Court of Appeals for the Second Circuit held that an assistant United States Attorney General

> in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy.

Id., 12 F.2d at 406. The *Yaselli* opinion was affirmed by the Supreme Court, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927) (per curiam) and its holding was reiterated in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), ironically, a case cited by the plaintiff for the opposite view. See Hrg. Tr. at 49-50. In *Gregoire*, the court capsulized the difficult questions involved:

> In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id., 177 F.2d at 581; see also *Imbler v. Pachtman*, 424 U.S. 409, 421-424 & nn. 18-21, 96 S.Ct. 984, 990-992 & nn. 18-21, 47 L.Ed.2d 128 (1976).

The effect of the enactment of the Civil Rights Acts on common-law prosecutorial immunity was raised and answered as to state prosecutors in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), and effectively answered as to *Bivens*-type actions against federal prosecutors in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

In *Imbler*, the plaintiff sought to recover damages, charging that the prosecuting attorney had knowingly used false testimony and had suppressed material evidence at the plaintiff's criminal trial. Rejecting that claim, the United States Supreme Court expressly held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983." *Id.*, 424 U.S. at 431, 96 S.Ct. at 995. Further, it appears in *Imbler* that absolute immunity was accorded the prosecutor's acts not because he was a prosecutor *per se*, but because the activities were functionally related to the judicial process. The Court of Appeals found, and the Supreme Court affirmed, that the prosecutor's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*, 424 U.S. at 430, 96 S.Ct. at 994.

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. . . .
>
> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription if [sic] improper and malicious actions to the State's advocate. . . .

Id., 424 U.S. at 422-423, 424, 425, 96 S.Ct. at 991, 992 (footnotes & citations omitted).

Holding prosecutors to be answerable in damages for their errors in trial preparation and performance would often divert their attention from the duties of their office to their own defense:

> The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and — ultimately in every case — the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a §1983 action would often require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury . . . frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Id., 424 U.S. at 425-426, 96 S.Ct. at 992-993 (footnote omitted). As further explained in *Imbler*, subjecting prosecutors to personal liability would heavily burden their otherwise wide discretion in the presentation of evidence. The trier of fact may often be denied the benefit of relevant evidence if a prosecutor fears liability for a witness that may be of less than absolute veracity. *Id.*

The right to a fair trial before an impartial jury is deemed to be a fundamental element of due process of law. See *e.g.*, *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *United States v. Crow Dog*, 532 F.2d 1182, 1187 (8th Cir. 1976), *cert. denied* 430 U.S. 929, 97 S.Ct. 1547, 51 L.Ed.2d 772 (1977). Like the question of judicial error or misconduct, there are adequate post-trial legal remedies for alleged prosecutorial

error or misconduct, and for determining whether in fact a fair trial has been held.

> These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

Imbler v. Pachtman, *supra*, 424 U.S. at 427, 96 S.Ct. at 993 (footnote omitted).[58]

Superimposing the civil damages remedy on this time-tested and well-balanced system of post-trial remedies would serve no need now unmet. It might even prove counterproductive. A prosecutor whose perspective is skewed by the spectre of personal liability might be more prone to conceal evidence suggesting innocence or mitigation, particularly following an initial conviction. Cf. ABA Code of Professional Responsibility SEC 7-13 (1969); *Imbler v. Pachtman*, *supra*, 424 U.S. at 427 n. 25, 96 S.Ct. at 993 n. 25. Taken together, the *Imbler* court found the potential harm of allowing §1983 liability to plainly outweigh the benefits, and held state prosecutors to be immune from suit for conduct in the initiation and prosecution of a criminal case.

[58] Prosecutors, like judges, are not immune to liability under the criminal provisions of the civil rights laws, *e.g.*, 18 U.S.C. §242 (1976), *id.*, 424 U.S. at 429, 96 S.Ct. at 994; *O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974), and further may be held accountable for misconduct by the professional association of their peers. See ABA Code of Professional Responsibility §DR 7-102 (1969).

Counsel for plaintiff queries, "who will prosecute the prosecutor?" Brief in Response, at 34 N. 26. When called upon, the system works, and works well. *E.g.*, *United States v. Mitchell*, 410 F.Supp. 1201 (D.D.C.1976), *affirmed sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C.Cir.1976), *cert. denied sub nom. Mitchell v. United States*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

That an equivalent immunity is available to federal prosecuting attorneys seems evident from a reading of *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), decided two years after *Imbler*. Finding it untenable to draw a distinction between suits under §1983 against state officials and direct actions under the Constitution against federal officers, the Supreme Court held that federal prosecutors, including those who serve that function in administrative agencies, are absolutely immune. *Id.*, 438 U.S. 512-517, 98 S.Ct. at 2913-2916. In so holding, the Court re-emphasized the functional purposes of the bar of absolute immunity:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process. . . . As the *Bradley* court suggested, 13 Wall., at 318-349,[39] controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, 386 U.S. at 554 [87 S.Ct. at 1217]. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Id., 438 U.S. at 512, 98 S.Ct. at 2913. *Butz* applies the full force of *Imbler* to immunize federal prosecutors from *Bivens*-type liability for their "prosecutorial" acts.

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious and dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. . . .

[39] *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872).

Imbler v. Pachtman, supra, 424 U.S. at 427-428, 96 S.Ct. at 993-994 (footnote omitted). There is thus no "name-clearing" civil retrial of a criminal charge in a damages suit against a United States Attorney or his assistants. There is no recovery of civil damages — particularly when, as here, the prosecutors' alleged misconduct has *not* deprived a defendant of his liberty.

In both *Butz* and *Imbler*, the Court left open the question whether prosecuting attorneys are absolutely immune for their "administrative" or "investigative" acts, i.e., for those actions which are not "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman, supra*, 424 U.S. at 430-431, 96 S.Ct. at 994-995; *Butz v. Economou, supra*, 438 U.S. at 511 n. 37, 98 S.Ct. at 2913 n. 37. A number of court of appeals decisions have held a prosecutor's investigative or administrative acts to be subject of a qualified "good faith" immunity rather than a quasi-judicial absolute immunity. See *e.g., Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (1st Cir. 1974); *Dodd v. Spokane County*, 393 F.2d 330 (9th Cir. 1968); *Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). Indeed, several of the cases cited by plaintiff's counsel in support of the complaint are classic examplars of this distinction. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979),[59] for example, applied a qualified immunity to participation by state district attorneys in an unlawful police raid on an apartment. Such actions were wholly outside of the judicial phase of a criminal prosecution. Compare *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978), *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir.1977), *cert. denied* 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978), cited for the proposition that a prosecutor's "lying is not immune," Hrg. Tr. at 54, dealt with allegations that a Justice Department attorney had perjured himself while testifying as a witness. Following extensive analysis of the relevant case law, the Court of Appeals in *Briggs* determined that "appellant's

[59] The Supreme Court reversed *Hampton* insofar as it awarded 42 U.S.C. §1988 attorneys fees prior to a final disposition of the merits. *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (per curiam). The Court of Appeals' opinion remains otherwise intact.

false statement to the federal district court in Florida is properly characterized as an act of investigation rather than advocacy." Such conduct "bears no relation whatever to the advocate's role as conceived by the Supreme Court in *Imbler*." *Id.*, 569 F.2d at 21. A third cited case, *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), held that officials of the Justice Department were entitled only to a qualified immunity in connection with their policy-making and supervisory participation in the arrest and detention of demonstrators during the "May Day Demonstrations" of 1971. A fourth, *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1922),[60] also recognizes and applies this distinction, *id.*, 468 F.2d at 410-412, as do more recent cases not referred to in the brief. See *e.g.*, *Brawer v. Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976); *Lee v. Willins*, 617 F.2d 320, 321 (2d Cir. 1980); *Forsyth v. Kliendienst*, 599 F.2d 1203 (3d Cir. 1979); *Slavin v. Curry*, 574 F.2d 1256, 1264-1265, *modified* 583 F.2d 779 (5th Cir. 1978).

The question in this case, therefore, distills to an inquiry whether the defendants' actions as set forth in the complaint describe "investigative" or "administrative" conduct, or describe actions which are intrinsically related to the initiation and prosecution of a criminal case.[61] *Imbler* and *Butz* leave to the courts the task of discerning what is "investigative," "administrative," or "judicial" about a prosecutor's behavior. In *Imbler*, Justice Powell observed that "[d]rawing a proper line between these functions may present difficult questions . . ." *Id.*, 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33.

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[60] As noted *supra* note 26, *Berbling* was reversed and vacated on other grounds by the United States Supreme Court. See *O'Shea v. Littleton*, 414 U.S. 488, 514, 94 S.Ct. 669, 685, 38 L.Ed.2d 674 (1974); *Spomer v. Littleton*, 414 U.S. 514, 523, 94 S.Ct. 685, 690, 38 L.Ed.2d 694 (1974).

[61] In *Imbler*, the court observed that "[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Id.*, 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33, which is at least to a degree, "investigative." See *Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979).

A practical analytical approach to this inquiry has been formulated by Judge Nickerson of the U.S. District Court for the Eastern District of New York. In approving that approach, the Court of Appeals for the Second Circuit described it as follows:

> We believe Judge Nickerson sensibly distinguished these two concepts in his opinion below. Although he recognized that prosecutorial and investigatory activities are necessarily interrelated to some degree, he separated them for purposes of applying the *Imbler* test for triggering the defense of absolute immunity *by reference to the type of harm allegedly suffered*. We endorse this useful and sensible approach. *Under this analysis, a prosecutor is immune from a suit to recover for an injury arising solely from the prosecution itself — e.g.*, being compelled to stand trial or to suffer imprisonment or pretrial detention. Such harm must always result in substantial part from the protected prosecutorial activities of initiating prosecution or presenting the state's case. *Imbler v. Pachtman*, 424 U.S. at 409, 96 S.Ct. at 985.
>
> *Where the alleged harm is inflicted independently of the prosecution, however, absolute immunity will not attach. See Hampton v. Hanrahan, supra.* If, for example, a prosecutor violates the Fourth Amendment by conducting an illegal search, the victim is harmed by the invasion of his zone of privacy, whether or not the evidence unlawfully obtained is introduced at trial. Redress for this harm is not barred by *Imbler*. See *J. D. Pflaumer, Inc. v. United States Department of Justice*, 450 F.Supp. 1125 (E.D.Pa. 1978).

Lee v. Willins, 617 F.2d 320, 322 (2d Cir. 1980) (emphasis added).

In the *Lee* case the alleged injuries were five year's imprisonment, "subjection to the ordeal of multiple trials, and the emotional and economic injury resulting therefrom." The Court of Appeals held that "[t]hese are

precisely the alleged injuries for which *Imbler* granted absolute immunity." *Id.*, 617 F.2d at 322.

Use of the *Lee v. Willins* analysis was recently reaffirmed by the same court in *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981), and harmonizes with the definitions applied by the Tenth Circuit, see *Taylor v. Nichols*, 558 F.2d 561, 565-566 (10th Cir. 1977), and by other courts. Compare *Briggs v. Goodwin, supra*, 569 F.2d at 19-20; *Hampton v. Hanrahan, supra*, 600 F.2d at 631-633; *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979); *Brewer v. Horowitz*, 535 F.2d 830, 834 (3d Cir. 1975); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1213-1215 (3d Cir. 1979); *Jarvis v. Roberts*, 489 F.Supp 924, 928 (W.D.Tex.1980); see generally 8A West's Federal Practice Digest 2d 496-514 (1980); *id.*, 1981 Supp., at 69-72 (1981).

A review of the complaint reveals no alleged harm inflicted by the defendants which was inflicted independently from the prosecution of the *Martinez* case. Plaintiff seeks to recover for the expense and stress of being compelled to face trial, mistrial and the commencement of a retrial.[62] Whether one considers the alleged failure to separately investigate the charges made in the indictment, or the purported "cover up" of the "real" reasons for the January 30th confession of mistrial, or even the purported conspiracy to "railroad" the plaintiff as concocted at the January 29th meeting with Judge Winner, one finds each claim to be "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman, supra*, 424 U.S. at 430, 96 S.Ct. at 994, be it in the initiation phase or the orchestration of the Government's case at trial.[63]

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[62] At hearing, counsel for plaintiff responded to this Court's inquiry by identifying emotional, economic and reputational harms that were directly connected to the *Martinez* indictment and mistrial. See Hrg. Tr. at 14-15, 39-40, 96-99, 137.

[63] While consideration of hidden cameras in the courtroom is to some extent "administrative," plaintiff alleges no agreement by the federal prosecutors, no overt act by them, nor any injury resulting from the cameras which were never installed. See pp. 305-306, *supra*. In a supplemental memorandum dated July 24, 1982, counsel for plaintiff cites *Forsyth v. Kleindienst*, 599 F.2d 1203, 1209-1216 (3d Cir. 1979), for

Dolan, Roberts, Chapman, Barksdale and Christopher participated in no *Hampton*-style raid, or any other similar conduct outside of the specific context of the *Martinez* prosecution — at least no such conduct is alleged in the complaint. Every allegation involves "a prosecutor's decision with respect to the initiation and conduct of particular cases." *Briggs v. Goodwin*, 569 F.2d 10, 20 (D.C.Cir. 1977). The plaintiff's claims against these defendants are appropriately dismissed on the grounds of absolute immunity.[64] See also *Norton v. Liddel*, 620 F.2d 1375, 1379 (10th Cir. 1980); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (per curiam); *Martinez v. Chavez*, 574 F.2d 1043, 1044 (10th Cir. 1978); *Taylor v. Nichols*, *supra*,

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the proposition that the discussion of courtroom cameras is beyond the reach of absolute immunity. Nothing in *Forsyth* prescribes liability without allegation of act and injury. Further, the *Forsyth* opinion observes that a prosecutor's decision to authorize warrantless electronic surveillances "is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function." *Id.*, 599 F.2d at 1215.

Finally, *Forsyth* dealt with warrantless wiretaps on private telephones. The expectations of privacy that attach to a private telephone are obvious. See *e.g.*, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In contrast, what expectation of privacy attaches to one's presence in a public courtroom? Cf. *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982).

[64] In *Imbler* the Court notes that "[t]he procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Id.*, 424 U.S. at 419 n. 13, 96 S.Ct. at 989 n. 13. Counsel for plaintiff contests this, asserting that a 12(b)(6) dismissal would be inappropriate prior to complete discovery. Plaintiff's Brief in Response, at 29-30, citing *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) as authority precluding dismissal. The *Hospital Building* case does *not* preclude dismissal; it advises that it be granted "very sparingly" in certain antitrust conspiracy cases. *Id.*, 425 U.S. at 746, 96 S.Ct. at 1853.

In civil rights actions against federal judges and prosecutors, the Supreme Court has expressed the proper approach:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. . . .

Butz v. Economou, *supra*, 438 U.S. at 507-508, 98 S.Ct. at 2911.

558 F.2d at 565-566; *Kostal v. Stoner*, 292 F.2d 492, 493 (10th Cir. 1961); *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980) ("conspiratorial" meeting between attorneys and judge subject to absolute immunity) (per curiam).

In its *Martinez* opinion, the Court of Appeals for the Tenth Circuit found that "[t]he government's failure to disclose the [Jan. 29] meeting to defense counsel and its misrepresentation as to the grounds for mistrial were obviously improper. The conduct surrounding the government's motion was not ordinary error." *Id.*, 667 F.2d at 890 (footnote omitted). Using this language as a springboard,[65] plaintiff asserts that a gross abuse of prosecutorial authority falls beyond the scope of the immunity doctrine. At argument, counsel urged that there is no immunity from suit for violation of the ABA Code of Professional Responsibility, citing *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) as authority. See Hrg. Tr. at 62. In *Hilliard*, the Court of Appeals held that a prosecutor stepped beyond the protection of absolute immunity by knowingly supressing an F.B.I. report on a seeminly bloodstained article of clothing, a report which exonerated the defendant. The failure to disclose evidence which is material to the question of a defendant's innocence amounts to a denial of constitutional due process, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as does the knowing use of false evidence. See *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967). *Hilliard* was understood to impose liability for "gross abuse of the prosecutorial function" of *Brady or Miller* calibre. See e.g., *Atkins v. Lanning*, 556 F.2d 485, 488 (10th Cir. 1977). Nothing in *Hilliard* indicated that violation of the ABA disciplinary rules *per se* avoids the effect of absolute immunity.[66]

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[65] See Plaintiff's Brief in Response, at 34 n. 25.

[66] The Supreme Court has described the actions dealt with in *Miller v. Pate* and *Brady v. Maryland* as "egregious conduct held ... to amount to a denial of constitutional due process" as opposed to "ordinary trial error." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-648, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). *Hilliard* on its facts reflected an obvious failure to produce *Brady* material. See *Hilliard v. Williams*, 516 F.2d 1344, 1349-1350 (6th Cir. 1975).

Subsequent to *Hilliard*, the Supreme Court decided *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), immunizing from damages liability a prosecutor's knowing use of perjured testimony, a clear violation of *Miller v. Pate*, *supra*. How then does *Hilliard* stand in relation to *Imbler*? Once again, counsel for the plaintiff stands upon vacant authority in asserting an argument: in the second appeal in *Hilliard*, 516 F.2d 1344, certiorari was granted by the Supreme Court, which *vacated and remanded* that action for reconsideration in light of *Imbler*. *Williams v. Hilliard*, 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 729 (1976) (order). On remand, the Court of Appeals for the Sixth Circuit directed that the complaint be dismissed pursuant to the rule set forth in *Imbler*. *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976). Counsel, however, has made no reference to the subsequent history of the *Hilliard* litigation and its consequent lack of precedential value.

While three justices of the *Imbler* Court would have adopted an "egregious conduct" exception to absolute immunity for unconstitutional withholding of *Brady* material, see *Imbler*, *supra*, 424 U.S. at 432-447, 96 S.Ct. at 996-1003, that view did not prevail, and is not now the law. *Id.*, 424 U.S. at 431-332 n. 33, 96 S.Ct. at 996 n. 33.

The defendants' failure to inform Martinez' defense counsel of the January 29 meeting was held to be seriously improper under the circumstances in *Martinez*. The prohibition of retrial was found to be an appropriate remedy.[67] Plaintiff's argument that a private damages remedy is also available is wholly without merit. See *Hilliard v. Williams*, *supra*, 540 F.2d at 221.

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[67] It is not clear that the United States Attorney is duty bound to disclose the substance of such a meeting under all possible circumstances. An *ex parte* communication, though woefully improper, is not evidence material to the defendant's innocence within the meaning of *Brady v. Maryland*, *supra*. See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Cf. *Imbler v. Pachtman*, *supra*, 424 at 432 n. 33, 96 S.Ct. at 996 n. 33. It is indeed difficult to say that on January 29, 1981, the defendants "knew or should have known" that nondisclosure of non-*Brady* material amounted to a constitutional violation. See *Harlow v. Fitzgerald*, ——

At the periphery of the defendants' prosecutorial immunity, plaintiff avers that the federal prosecutors negligently failed to independently investigate the charges against him before deciding to seek a grand jury indictment. In effect, plaintiff argues that the defendants owed him a duty to do an adequate independent investigation. Although civil rights claims have been described as "a series of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976), "it is perfectly clear that not every injury in which a state [or federal] official has played some part is actionable" under the Civil Rights Acts, *Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980), or directly under the Constitution. Cf. *Davis v. Passman*, 442 U.S. 228, 248, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979).

The first question is whether the plaintiff asserts a constitutionally protected right. See *Butz v. Economou*, *supra*, 438 U.S. at 504, 98 S.Ct. at 2909. Plaintiff cites no legal authority holding that the United States Attorney owes such a constitutional duty of independent investigation; the courts which have previously considered the claim have denied it. *Halpern v. City of New Haven*, 489 F.Supp. 841 (D.Conn. 1980) and *Hall v. Flathead County Attorney*, 478 F.Supp. 644 (D.Mont. 1979), held such claims to be within the scope of *Imbler* immunity:

The problem of what evidence to believe, what evidence

U.S. ——, ——, 102 S.Ct. 2727, 2739, 73 L.Ed.2d 396 (1982). Officers exercising discretion can be held liable for damages only for conduct violating "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; see *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 1978; *Wood v. Strickland*, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975).

Nothing in *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977) or *Halperin v. Kissinger*, 606 F.2d 1192, 1208-1214 (D.C.Cir. 1979), *affirmed by equally divided court* 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981), adds any force to plaintiff's case. Though cited by counsel in a supplemental memorandum dated July 24, 1982 as dealing with "cover-up" (i.e., the failure to disclose in violation of a duty to disclose), nothing in these cases deals with a prosecutor's nondisclosure of non-*Brady* information.

> to present, what avenues of inquiry to pursue, and what cases to file, lie at the heart of the prosecutorial function, and decisions as to them are the kinds which ought not to be the subject matter of second-guessing in a civil rights action.

Hall v. Flathead County Attorney, *supra*, 478 F.Supp. at 645; accord, *Halpern v. City of New Haven*, *supra*, 489 F.Supp. at 843. See also *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979). Most recently in *Gray v. Bell*, 542 F.Supp. 927 (D.D.C. 1982), the U.S. District Court for the District of Columbia rejected an almost identical claim:

> By alleging here that defendants' negligence in conducting the pre-indictment investigation legally caused subsequent violations of his Fifth Amendment rights, Gray assumes tha defendants owed him a duty under the Fifth Amendment to conduct a careful, thorough investigation before presenting evidence to the grand jury in their attempt to obtain his indictment. This assumption, however, is misplaced.
>
> Although defendants did owe Gray some duties during the course of their pre-indictment investigation, such as not to violate his Fourth Amendment rights, see *Halperin v. Kissinger*, 606 F.2d [1192] at 1208; *Aptoa v. Wilson*, 506 F.2d [83] at 93, defendants owed Gray no duty under the Fifth Amendment to conduct a careful, thorough[,] pre-indictment investigation.

Id., 542 F.Supp. at 930 (footnotes omitted).

The grand jury, not the United States Attorney's office, is the constitutionally provided forum for an independent preindictment evaluation of the evidence. "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); accord, *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). The institution of the grand jury

> was adopted in this country. . . . and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country. . . . to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

Ex parte Bain, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1887). As the Supreme Court more recently re-emphasized, "[t]he grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 [92 S.Ct. 2646, 2659, 33 L.Ed.2d 626] (1972)." *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). It is well-settled that when a duly constituted grand jury returns an indictment that is valid on its face, it "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U.S. 241, 250 [53 S.Ct. 129, 131, 77 L.Ed. 283] (1932). See also *Giordenello v. United States*, 357 U.S. 480, 487 [78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503] (1958)." *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19, 95 S.Ct. 854, 864 n. 19, 43 L.Ed.2d 54 (1975). No independent inquiry may be made to determine the adequacy of evidence considered by the grand jury in making its decisions. *Costello v. United States*, 350 U.S. 359, 361-364, 76 S.Ct. 406, 407-409, 100 L.Ed. 397 (1956). See also *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958); *United States v. Blue*, 384 U.S. 251, 255 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966); *United States v. Calandra*, *supra*, 414 U.S.at 344-345, 94 S.Ct. at 618; cf. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Bracy*, 566 F.2d 649 655-656 (9th Cir. 1977). The

United States Attorney owes the defendant no actionable duty to serve as a second grand jury;[68] and he will be mulcted in damages for failing to second-guess federal and state law enforcement officers through the redundant device of an "independent" investigation.[69] A proper grand jury indictment stands as an independent preliminary affirmation of the prosecutor's decision to proceed, and "is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." *Lawn v. United States*, *supra*, 355 U.S. at 349, 78 S.Ct. at 317.[70]

The plain message of *Imbler*, *Butz*, and related cases is that judicial review of a prosecutor's conduct in initiating and pursuing a criminal proceeding is not available in the context of a private civil damages action, no matter whether it arises at common law, see *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *affirmed* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927) (per curiam), under 42 U.S.C. §1983, *Imbler v. Pachtman*, *supra* §1985, see *Kostal v. Stoner*, 292 F.2d 492, 493 (10th Cir. 1961); *Halpern v. City of New Haven*, 489 F.Supp. 841, 844 (D. Conn. 1980), §1986, see *Hampton v. Hanrahan*, *supra*, 600 F.2d at 633 n. 31, or directly under the Constitution itself, *Butz v. Economou*, *supra*.

To say that the United States Attorney owes no actionable obligation of the kind asserted by the plaintiff does not mean that he owes no duty at all.

[68] Even if the complaint alleged prosecutorial misconduct in dealing with the grand jury, which it does not, the ultimate remedy would have been dismissal of the indictment, see *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979), not a private civil action for damages.

[69] Even assuming *arguendo* a duty to make an adequate independent investigation is enforceable against a federal prosecutor through the mechanism of a private civil damages action, the action would seem to lie in favor of the victims of purported crimes, not the perpetrators. Cf. *National Ass'n for the Advancement of Colored People v. Levi*, 418 F.Supp. 1109, 1116-1117 (D.D.C. 1976), *dismissed* 76 F.R.D. 134 (1977).

[70] The fact of grand jury indictment would present a formidable obstacle to a common-law malicious prosecution action, were one pleaded in the complaint. See Annot., 28 A.L.R.3d 748 (1969); *Konas v. Red Owl Stores*, 158 Colo. 29, 404 P.2d 546 (1965); Restatement (2) at Torts §664 (1977). Counsel for plaintiff admitted as much at hearing. Hrg. Tr. at 137.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). In the words of the late Justice William O. Douglas, "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649, 94 S.Ct. 1868, 1873-1874, 40 L.Ed.2d 431 (1974) (Douglas, J. dissenting). As Justice Powell wrote for the court in *Imbler*, "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Id.*, 424 U.S. at 424, 96 S.Ct. at 992.

Far from a license for gross abuse, prosecutorial immunity is necessary insulation for the exercise of sound professional judgment.[71] The federal district courts and the

[71] A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.

Imbler v. Pachtman, *supra*, 424 U.S. at 426 n. 24, 96 S.Ct. at 993 n. 24. Sir William Blackstone observed long ago that "it would be a very great

courts of appeals stand ready to exercise their inherent supervisory powers in dealing with instances of prosecutorial misconduct. *Donnelly v. DeChristoforo, supra*, 416 U.S. at 648 n. 23, 94 S.Ct. at 1873 n. 23; *United States v. Banks*, 383 F.Supp. 383 F.Supp. 389, 389, 392 (D.S.D.1974).

Plaintiff's claims for declaratory and injunctive relief, though not barred by immunity, are as manifestly inappropriate as against the federal prosecutor-defendants as they were against Judge Winner. See pp. 309-312, *supra*. Those claims are likewise properly dismissed. See *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 647 (1974).

The plaintiff's common-law claims are addressed against these defendants are barred by prosecutorial immunity as well. *Butz v. Economou, supra*, 438 U.S. at 494-495 & nn. 21-22, 98 S.Ct. at 2904-2905 & nn. 21-22; *Sami v. United States*, 617 F.2d 755, 770-771 (D.C.Cir.1979); *Miller v. DeLaune*, 602 F.2d 198, 199-200 (9th Cir. 1979); *George v. Kay*, 632 F.2d 1103, 1105-1106 (4th Cir. 1980); *Owylee Grazing Ass'n, Inc. v. Field*, 637 F.2d 694, 697 (9th Cir. 1981); see also *Harlow v. Fitzgerald*, —— *U.S.* ——, *102 S.Ct. 2727, 2739, 73 L.Ed.2d 396 (1982)*.

VII. CLAIMS UNDER 42 U.S.C. §§ 1981, 1985, 1986 and 1988

Plaintiff alleges a general claim for relief under 42 U.S.C. §1981 (1976) against all of the defendants. That section reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall

discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground for suspicion, were liable to be sued at law whenever their indictments miscarried." 3 W. Blackstone, Commentaries on the Laws of England 126-127 (1768).

> be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This section, a product of the 1866 and 1870 Civil Rights Acts, *Runyon v. McCrary*, 427 U.S. 160, 168-172 & n 8, 96 S.Ct. 2586, 2593-2595 & n. 8, 49 L.Ed.2d 415 (1976),[72] "on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975). Though primarily enacted to eradicate the "badges and incidents" of black slavery, *Jones v. Alfred H. Mayor Co.*, 392 U.S. 409, 438-439, 88 S.Ct. 2186, 2202-2203, 20 L.Ed.2d 1189 (1968); *The Civil Rights Cases*, 109 U.S. 3, 20, 3 S.Ct. 18, 27, 27 L.Ed. 835 (1883), it has been held to bar racial discrimination against all groups involved

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[72] The Act of Apr. 9, 1866, § 1, read in part:

> "That all persons born in the United States . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27

The present codification of §1981 is derived from Revised Statutes §1977 (1874), which codified the Act of May 31, 1870, §16, 16 Stat. 144. Although the 1866 Act rested only on the Thirteenth Amendment, *United States v. Harris*, 106 U.S. 629, 640, 1 S.Ct. 601, 610, 27 L.Ed. 290 (1883); *Civil Rights Cases*, 109 U.S. 3, 22, 3 S.Ct. 18, 29, 27 L.Ed. 835 (1883); *United States v. Morris*, 125 F. 322, 323 (E.D. Ark. 1903), and, indeed, was enacted before the Fourteenth Amendment was formally proposed, *United States v. Price*, 383 U.S. 787, 804, 86 S.Ct. 1152, 1162, 16 L.Ed.2d 267 (1966); *Hurd v. Hodge*, 334 U.S. 24, 32 n 11, 68 S.Ct. 847, 851 n. 11, 92 L.Ed. 1187 (1948); *Oyama v. California*, 332 U.S. 633, 640, 68 S.Ct. 269, 272, 92 L.Ed. 249 (1948); *Civil Rights Cases, supra*, 109 U.S. at 22, 3 S.Ct. at 29, the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment. *See United States v. Wong Kim Ark*, 169 U.S. 649, 695-696, 18 S.Ct. 456, 474-475, 42 L.Ed. 890 (1898). The 1886 Act was re-enacted in 1870, and the predecessor of the present §1981 was to be "enforced according to the provisions" of the 1866 Act. Act of May 31, 1870, §18, 16 Stat. 144.

in the affairs and transactions within its scope. See *e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-289 & nn. 17-20, 96 S.Ct. 2574, 2582-2583 & nn. 17-20, 49 L.Ed.2d 493 (1976); *United States v. Wong Kim Ark*, 169 U.S. 649, 675-676, 18 S.Ct. 456, 467, 42 L.Ed. 890 (1898). As one member of the House of Representatives observed, "Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer on one race or color of the citizens shall be held by all races in equality." Cong.Globe, 39th Cong., 1st Sess, at 1293 (1866).[73]

The complaint nowhere alleges that plaintiff has been discriminated against in the making of contracts. Compare *Ramirez v. San Mateo County Dist. Atty's Office*, 639 F.2d 509 (9th Cir. 1981). Nor is it alleged that he has been denied the right to sue, be a party, or give evidence.[74] The complaint says nothing of "punishment, pains, penalties, taxes, licenses, and exactions of every kind," 42 U.S.C. §1981. To predicate an action under this section, plaintiff must have been denied a legal right which would have been afforded under similar circumstances to a person of a different race. Compare *Vietnamese Fishermen's Ass'n v. Knights of the KKK*, 518 F.Supp. 993, 1001 (S.D.Tex.1981). The alleged wrongdoing by federal officials set forth in the complaint does not fall within the intended scope or purpose of a §1981 action. See *Harris v. Norfolk & W. Ry. Co.*, 616 F.2d 377, 378

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[73] The Supreme Court has engaged in extensive discussion of the legislative history of this section. See *McDonald v. Santa Fe Trail Transp. Co.*, *supra*, 427 U.S. at 287-296 & nn. 17-26, 96 S.Ct. at 2582-2586 & nn. 17-26; *Runyon v. McCrary*, *supra*, 427 U.S. at 168-172 & n. 8, 96 S.Ct. at 2593-2595 & n. 8; *id.*, 427 U.S. at 195-211, 96 S.Ct. at 2606-2613 (White, J. dissenting); *Johnson v. Railway Express Agency*, *supra*, 421 U.S. at 471, 95 S.Ct. at 1725 (Marshall, J.); *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 422-437, 88 S.Ct. at 2194-2202.

[74] The *Martinez* case is plainly not *People v. Hall*, 4 Cal. 399 (1854), *People v. Howard*, 17 Cal. 63 (1860), or *People v. Washington*, 36 Cal. 658 (1869), all of which applied state statutes which read, for example that "no Chinese shall be permitted to give evidence for or against any white person." *People v. Washington*, *supra*. Nothing alleged in the complaint herein even approaches that kind of discrimination.

(8th Cir. 1980); note 73, *supra*.[75] Count I of the complaint shall therefore be dismissed against the federal defendants.

Similarly, Count V of the complaint fails in large part to state a legally cognizable claim uncer 42 U.S.C. §1988: "[t]hat section is procedural and alone does not give rise to a cause of action." *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977); *Reeves v. American Optical Co.*, 408 F.Supp. 297, 302 (W.D.N.Y.1976); see also *Redd v. Lambert*, 522 F.Supp. 608, 610-611 (N.D. Miss.1981). Section 1988 speaks of remedies to be afforded under other sections of the Civil Rights Acts, and to the discretionary award of a reasonable attorney's fee to a "prevailing party" in an action under other civil rights sections. See *e.g.*, *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). Plaintiff's §1988 claim for attorney's fees rises or falls with the fate of his other claims.[76] *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (per curiam). Count V is otherwise dismissed.

Next considering the allegations of claims under 42 U.S.C. §§1985(2),[77] 1985(3) and 1986 (1976), one must again steep the whole of plaintiff's pleading in the strong acid of close analysis in order to press out his statutory claims. "A conspiracy must be judged by its constituent parts." *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976), and this Court must attempt to connect

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[75] "[A] plaintiff's claim under . . . §1983, must be grounded on the violation of a right of substance and not merely on a theoretical speculation that some right has been infringed." *Holmes v. Finney*, 631 F.2d 150, 154 (10th Cir. 1980).

[76] A claim for §1988 attorney's fees may well be barred by absolute judicial or prosecutorial immunity. Cf. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-739, 100 S.Ct. 1967, 1977-1978, 64 L.Ed.2d 641 (1980).

[77] While Count III of the complaint alleges violation of the whole of §1985, nothing in the pleading refers to any act or conspiracy to impede a federal officer in the performance of his duties, which is the subject matter of §1985(1). That section is excluded from further consideration.

those averred parts to specific language in the statute.[78] This Court approaches "the perfidious syntax of §1985(2)" with some caution, "for, as the First Circuit recently observed, there is a dearth of authority to light our way. *Hahn v. Sergent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, [425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754] (1976)." *Brawer v. Horowitz*, 535 F.2d 830, 837 (3d Cir. 1976). 42 U.S.C. § 1985(2) reaches conduct described as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

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[78] In *Coopersmith v. Supreme Court, State of Colorado*, 465 F.2d 993, 994 (10th Cir. 1972), the Court of Appeals reminds us that

> [u]nder the Federal Rules of Civil Procedure, and especially Rule 8(a)(2), a complaint must state the basis for the claim asserted. See *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 and *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir.). Of course, on such a motion as this, facts well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim.

Each of the counts of the complaint refer to paragraphs 1-148 of that document as its basis.

This Court joins the conclusion of other courts that "§1985(2) itself subdivides into two parts — that which precedes and that which follows the semicolon." *Brawer v. Horowitz, supra*, 535 F.2d 840; *Hahn v. Sargent, supra*, 523 F.2d at 469. The first half of §1985(2) is directed at conspiracies the object of which is direct intimidation of, or retaliation against parties, or witnesses, or grand and petit jurors in any court of the United States. See *e.g., Williams v. St. Joseph Hospital*, 629 F.2d 448, 451 (7th Cir. 1980). Other than broad, conclusory allegation of "conspiracy," the complaint sets forth no conduct coming within the scope of this portion of §1985(2).[79]

The latter half of §1985(2) reaches those conspiracies to obstruct justice "in any State or Territory" which have as their object the denial of the equal protection of the laws. While this portion may be limited to interference with state court proceedings, *Williams v. St. Joseph Hospital, supra*, 629 F.2d at 451; *DeBoer v. Martin*, 537 F.Supp. 1159, 1161 (N.D.Ill.1982), in any case it requires an allegation of racial or other class-based discrimination as mandated in §1985(3) cases under the United States Supreme Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971):

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [Emphasis in original; footnote omitted.]

Plaintiff's complaint as against Judge Winner and the other federal defendants, while heavy with allegations of personalized bias and prejudice against plaintiff, is threadbare in terms of well-pleaded facts from which a racial, or otherwise class-based discriminatory animus may

[79] In *Brawer*, the Third Circuit presents a meaningful analysis of §1985(2)'s legislative history. See *id.*, 535 F.2d at 837-840.

be discerned. Compare *Harris v. Harvey*, 605 F.2d 330, 333 (7th Cir. 1979); *Vietnamese Fishermen's Ass'n v. Knights of the KKK*, 518 F.Supp. 993 (S.D.Tex.1981). Indeed, there is a paucity of facts pleaded in the complaint from which any federal "conspiracy" may be inferred. "A conspiracy may be implied by a course of conduct and other circumstantial evidence," *Cackling Acres, Inc. v. Olson Farms, Inc., supra*, 541 F.2d at 245, but the circumstantial facts relied upon must at least point in some minimal way to an actionable conspiracy. There must be some indicia of agreement in an unlawful means or end. Cf. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-1609, 26 L.Ed.2d 142 (1970); *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979); *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979); *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971). Attending a single *ex parte* meeting at the direction of a presiding trial judge, though improper, does not a conspiracy make. Even "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement of the conspirators." *Grunewald v. United States*, 353 U.S. 391, 401-402, 77 S.Ct. 936, 972, 1 L.Ed.2d 931 (1957). A complaint must plead more than self-serving characterizations and conclusions of wrongdoing to state a claim. Cf. *Hahn v. Sargent*, 388 F.Supp. 445, 453 (D.Conn.1974), *affirmed* 523 F.2d 461 (1st Cir. 1975).[80] It is not "sufficient to make out a conspiracy claim merely if the combined effect of the individual actions of the parties was harm to the plaintiff." *Id.*, 388 F.Supp. at 454. As against the federal defendants, any §1985(2) claim fails for insufficiency in pleading as well as the bar of absolute immunity, when applicable.

[80] While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture.

Manganaro v. Delavel Separator Co., 309 F.2d 389, 393 (1st Cir. 1962).

Section 1985(3) seems to bear the closest relationship to the claims expressed in the first 148 paragraphs of the complaint.[51] That section reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

for [sic] our purposes herein, the elements that the plaintiff must allege and prove for a 42 U.S.C. §1985(3) cause of action are as follows:

(1) The defendants must conspire

(2) For the purpose of depriving, either directly, or

[51] Yet it is also apparent that the portions of §1985(3) that deal with exercise of the voting franchise are wholly irrelevant to this case.

indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws; and

(3) The defendants must act in furtherance of the object of the conspiracy, whereby

(4) One was (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 923 (5th Cir. 1977) (en banc). Section 1985(3) does not afford any substantive rights of its own, *Great American Savings and Loan Ass'n v. Novotny*, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957 (1979); a §1985(3) claim is exclusively derivative and must be based upon other alleged infringements of the plaintiff's federally protected rights. *Oaks v. City of Fairhope, Ala.*, 515 F.Supp. 1004, 1045 (S.D.Ala.1981). "[I]nfringement of some federally protected right independent of §1985(3) is required for a violation of the conspiracy statute to be demonstrated." *Holmes v. Finney*, 631 F.2d 150, 154 (10th Cir. 1980); *Great American Savings and Loan Ass'n v. Novotny, supra;* "[s]ection 1985(3) redresses deprivation of the protection of the laws, and one is only deprived of the protection of the laws when the laws themselves have been violated." *McLellan v. Mississippi Power & Light Co., supra*, 545 F.2d at 926-927; see also *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Vietnamese Fishermen's Ass'n, supra*, 518 F.Supp. at 1006.

Further, the Supreme Court in *Griffin v. Breckenridge* made it clear that §1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others," but only to those which were founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.*, 403 U.S. at 101-102, 91 S.Ct. at 1798; accord, *Briley v. State of California*, 564 F.2d 849, 859 (9th Cir. 1977); *Hahn v. Sargent, supra*, 523 F.2d at 468-469; *McLelland v. Mississippi Power & Light Co., supra*, 545 F.2d

at 924-933.[82] Section 1985(3) thus does not afford a right of action based upon a denial of due process standing alone,[83] or a denial of First Amendment rights without more,[84] or an unequal injury, or unequal application of the laws. See *Collins v. Hardyman*, 341 U.S. 651, 661, 71 S.Ct. 937, 941, 95 L.Ed. 1253 (1950); *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944); *Taylor v. Nichols*, 409 F.Supp. 927, 936 (D.Kan.1976), *affirmed* 558 F.2d 561 (10th Cir. 1977); *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966); *Mitchell v. Greenough*, 100 F.2d 184, 187 (9th Cir. 1938) ("the prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action."). "Conduct directed at a plaintiff because of individual or personal traits rather than because of class membership, is insufficient to sustain a claim under §1985(3)." *Oaks v. City of Fairhope, Ala., supra*, 515 F.Supp. at 1046 n. 31; *McLelland v. Mississippi Power & Light Co.*, 525 F.2d 870, 877 (5th Cir. 1976), *vacated in part on other grounds*, 545 F.2d 919, 933 (1977) (en banc.)[85]

[82] The Supreme Court has also discussed the legislative history of §1985(3) at some length. See *Great American Savings & Loan Ass'n v. Novotny, supra*, 442 U.S. at 370 n. 7, 99 S.Ct. at 2347 n. 7 and cases cited therein.

[83] See *e.g., Oaks v. City of Fairhope, Ala., supra*, 515 F.Supp. at 1045, and cases cited therein.

[84] See *e.g., Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied* 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881 (1974); *Egan v. City of Aurora*, 291 F.2d 706, 707 (7th Cir. 1961).

[85] The court in *Hahn v. Sargent*, for example, dismissed a §1985(3) claim the basis for which was "that the plaintiff as an *individual* was singled out for harm by these defendants because of his 'militant republicanism' as opposed to any allegation that the defendants' activites were based upon racial or 'otherwise class-based, invidiously discriminatory animus.'" *Id.*, 388 F.Supp. at 449 (emphasis in original; citations omitted). See also *Taylor v. Nichols, supra*, 558 F.2d at 568. In *Taylor* the Tenth Circuit held that a police officer plaintiff had "failed to make even a minimal showing that he was denied equal protection or equal privileges and immunities . . . He has made no showing that other individuals have not been prosecuted in similar circumstances or that groups other than police officers have not been so prosecuted." §1985(3) plainly requires more than the simple allegation that the plaintiff's constitutional rights have been violated.

Like conspiracies under §1985(2), conspiracies within §1985(3) must be pleaded with more than "bare allegations that all the defendants 'conspired' to deprive him of his constitutional rights." *Henzel v. Gerstein*, 608 F.2d 654, 659 (5th Cir. 1979); see *Weise v. Reisner*, 318 F.Supp. 580, 583-584 (E.D.Wis.1970). While it is true that the Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), directed that a civil rights complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, this standard does not become operative unless a privilege or right secured by the Constitution or federal law "is identified and put into issue by the allegations of the complaint." *Taylor v. Nichols*, *supra*, 409 F.Supp. at 932. As the district court explains in *Taylor*,

> Contrary to the plaintiff's apparent belief, however, *Conley et al.*, do not stand for the converse proposition that, if a complaint alleges myriad facts but does not identify the specific constitutional right allegedly implicated in those facts, dismissal is inappropriate unless it appears beyond doubt that the plaintiff can conjure up no constitutional claim on the basis of the facts alleged or on the basis of any other set of acts which might conceivably be proved. . . . [T]he use of such a standard would directly contravene the requirement of Rule 8(a)(1) that a complaint must set forth a "short and plain statement of the grounds upon which the court's jurisdiction depends."

Id., 409 F.Supp. at 932, *affirmed*, 558 F.2d 561 (10th Cir. 1977)

The Rule 8(a)(2) requirement that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" is equally offended by a complaint that alleges a myriad of constitutional and legal grounds for relief but does not identify the specific facts that implicate those grounds.

A complaint in a case like this must set forth facts

> showing some intentional and purposeful deprivation of constitutional rights. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). This complaint does contain some general allegations, framed in broad language closely paralleling that used in Sections 1983 and 1985(3), that defendants successfully conspired to deprive plaintiff of his rights. But plaintiff was bound to do more than merely state vague and conclusory allegations respecting the existence of a conspiracy. It was incumbent upon him to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy. *Hoffman v. Halden*, supra, 268 F.2d [280] at 295 [(9th Cir. 1959)].

Powell v. Workmen's Compensation Board of N.Y., 327 F.2d 131, 137 (2d Cir. 1964). It is well-settled that a §1985(3) conspiracy must be pleaded with specificity. See *Boddorff v. Publisher Indus., Inc.*, 488 F.Supp. 1107, 1111 & nn. 9-12 (E.D.Pa.1980), and cases cited therein; *Albright v. R. J. Reynolds Tobacco Co.*, 463 F.Supp. 1220, 1231 (W.D.Pa.1979) ("a plaintiff in a civil rights case must plead highly specific facts in support of the allegations of the complaint, particularly where a conspiracy on the part of the defendants is claimed."); see also *Robinson v. McCorkle*, 462 F.2d 111, 113 (3rd Cir. 1972), *cert. denied* 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1973).

Counsel for the plaintiff has seemingly sought to avoid these pleading requirements through the argument that the "conspiracy" is itself an actionable injury, without more. See Hrg. Tr. at 39, 121, 137. As noted above, however, a §1985(3) plaintiff must allege overt acts resulting in injury to rights independent of §1985(3). Section 1985(3) itself expressly requires an act causing injury. As *El Mundo, Inc. v. Puerto Rico Newspaper Guild, Local 225*, 346 F.Supp. 106 (D P.R.1972) — a case cited by plaintiff — points out,

> In a civil conspiracy, the conspiracy itself is not a cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area

> of thought and conversation into action and causes the civil injury and resulting damages. Accordingly, the cases hold that the damage in a civil conspiracy flows from the overt acts and not from the conspiracy.

Id., 346 F.Supp. at 114, quoting *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir. 1959). Accord, *Weise v. Reisner*, *supra*, 318 F.Supp. at 583. The complaint alleges no overt acts pursuant to the "hidden camera" conspiracy. As to the "railroading" conspiracy, plaintiff points to the prosecutors' confession of mistrial. It is unfathomable how a confession of mistrial is itself a constitutional or legal wrong. See *Holmes v. Finney*, *supra*, 631 F.2d at 154 (10th Cir. 1980). The "injury" that a declaration of mistrial occasions is not itself actionable, because of both judicial/prosecutorial immunity and sound considerations of public policy. See *Cobbledick v. United States*, 309 U.S. 323, 325-326, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1978).

Beyond that, plaintiff alleges that the federal defendants sought to violate his fundamental right to a fair trial because he is a Chicano activist. The right to a fair trial is a question more of due process rather than equal protection. The complaint does not allege, for example, that the federal defendants routinely deny fair trials to all Chicanos *per se* or that they act pursuant to a statute or regulation that so discriminates. Cf. Complaint at ¶141. As the United States Supreme Court observed in *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951):

> Plaintiffs rights were certainly invaded, disregarded, and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other [citizen], and may be vindicated in the same way and with the same effect as those of any other citizen . . .

Id., 341 U.S. at 661-662, 71 S.Ct. at 941-942.[86]

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[86] The authority of *Collins v. Hardyman* was limited by the Court in *Griffin v. Breckenridge*, 403 U.S. 88, 93-96, 91 S.Ct. 1790, 1793-1795, 29

It is one thing to say that a Chicano has been treated unfairly in a criminal trial. It is quite another to say that Chicanos are not entitled to fair trials. The former is a due process problem, the latter an equal protection problem. That a plaintiff is a member of an identifiable racial group or other class does not convert every substantive legal injury into a denial of equal protection.

Martinez' rights were vindicated by the bar of any retrial on the original charges. *Collins v. Hardyman, supra.* That there will be no retrial is not a cognizable injury to the plaintiff. See *Reilly v. Leonard*, 459 F.Supp. 291, 301 (D.Conn.1978).

As noted above, there is a paucity of well-pleaded facts that evidence the federal defendants' agreement to any §1985(3) "conspiracy". [s|c] Adversity at trial is not necessarily conspiratorial. See *Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir. 1980).

L.Ed.2d 338 (1971). *Griffin* extended the reach of §1985(3) to include private conspiracies, overruling the "state action" requirement read into the statute by *Collins*. The *Griffin* Court, however, recognized an important limitation:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id., 403 U.S. at 101-102, 91 S.Ct. at 1798. As originally written, §1985(3) would have reached conspiratorial acts committed with intent "to do any act in violation of the rights, privileges, or immunities of another person . . ." Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871). The language requiring a discriminatory animus was added to limit the statute's scope. *Griffin, supra*, 403 U.S. at 100, 91 S.Ct. at 1797. See also *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). The language quoted from *Collins* herein is harmonious with the *Griffin* limitation.

Were the complaint against the federal defendants not dismissed on other more pre-emptive grounds, it would be vulnerable under Rule 8(a) standards.

The same can be said of Plaintiff's claims under §1986, which reads as follows:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in this action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

A §1986 action is derivative from the existence of a §1985 conspiracy and merely gives a remedy for misprision of such a conspiracy. A failure to state a claim of conspiracy under §1985 renders a complaint's §1986 claims equally vulnerable to dismissal. *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977); *William v. St. Joseph Hospital*, 629 F.2d 448, 452 (7th Cir. 1980); *Hahn v. Sargent*, 523 F.2d 461, 469-470 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754; *DeBoer v. Martin*, 537 F.Supp. 1159, 1162 (N.D.Ill.1982).

To say that §1986 renders one with knowledge liable for

not aiding in preventing the wrongs conspired to be done, *e.g., Vietnamese Fishermen's Ass'n v. Knights of the KKK*, 518 F.Supp. 993, 1007 (S.D.Tex. 1981), does not extend liability to encompass a failure to expose one person's apparent desire to form such a conspiracy, where he stands alone. Section 1986, like §1985, premises liability upon the doing of a wrongful conspiratorial act and the causing of a resulting injury.[87]

VIII. CLAIMS AGAINST THE DEPUTY U. S. MARSHALS

That "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right" is fundamental. *Carlson v. Green*, 446 U.S. 14, 18, 100 S.Ct. 1468, 1472, 64 L.Ed.2d 15 (1980); *Davis v. Passman*, 442 U.S. 228, 234, 245, 99 S.Ct. 2264, 2271, 2277, 60 L.Ed.2d 846 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct 1999, 29 L.Ed.2d 619 (1971). However, *Bivens* and its progeny do not create an absolute right to the damages remedy. Damages may be awarded in a *Bivens*-type action if there are "no special factors counselling hesitation in the absence of affirmative action by Congress," *Davis v. Passman, supra*, and if it does not appear "that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green, supra*, 446 U.S. at 18, 100 S.Ct. at 1472. Among the "special factors counselling hesitation" is the consideration that "there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978), such as those involved in the judicial process.

Under appropriate circumstances, a United States Marshal or his deputies may be a defendant in a §1985(3) or

[87] Section 1986's strict one year statute of limitations would bar recovery in this lawsuit for any conduct prior to January 29, 1981. *See Creative Environments, Inc. v. Estabrook*, 491 F.Supp. 547 (D.Mass. 1980).

Bivens-type damages action. *Loe v. Armistead*, 582 F.2d 1291, 1294-1295 (4th Cir. 1978) *cert. denied sub nom. Moffitt v. Loe*, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980); *Gillespie v. Civiletti*, 629 F.2d 637, 641-642 (9th Cir. 1980). The question here is whether this action presents appropriate circumstances for damages relief or affects special function requiring full exemption.

The complaint alleges only that Deputy United States Marshals Baer, Dunn, Weisenhorn, and special deputy Spencer were present at the January 29 meeting at Judge Winner's direction, ¶89, and that "Dunn, Peyton, Baer [sic] and Weisenhorn . . . carried out improper and unconstitutional orders given by defendant Winner, as hereinabove stated [?], and acted as go-between between defendants Winner, Tyus and Nicoletti." Complaint at ¶104.[88] 28 U.S.C. §569(b) provides that "United States marshals shall execute all lawful writs, process and orders issued under the authority of the United States . . ." The complaint herein merely hails the defendants into court for having followed that statutory command. The complaint is wholly unspecific as to what "unconstitutional orders" were carried out. Even when viewed through the enhancing lens of plaintiff's brief, the deputies appear only as "actors in minor roles," Brief at 29, in the larger conspiracy, who by

[88] In the Plaintiff's Brief in Response, counsel makes reference to *unpleaded* allegations that defendant Sandy Spencer (1) tore down a pro-Martinez poster hanging at the University of Denver Law School, where she was a student; and (2) held views in opposition to the plaintiff. Not only is it settled that not every injury inflicted by a public officer is of constitutional stature, see *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), it is not at all apparent that she was acting in her official capacity as opposed to her private capacity as a law student. See Hrg. Tr. at 124; compare *Classon v. City of Louisville, 518 F.2d 899 (5th Cir. 1975)*.

Furthermore, the question of whether her alleged bias "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974), is not before this Court because the mistrial precluded any "resulting conviction."

their failure to dissuade or deter Judge Winner violated 42 U.S.C. §1986. *Id.*, at 32.[89] Plaintiff alleges no wrongdoing by the deputies that is independent of Judge Winner's actions, nor does he allege an injury proximately resulting from the deputies' conduct independent of that which resulted from the mistrial itself. Cf. *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir. 1980); pp. 316-317, *supra*. Plaintiff does not allege a clear absence of jurisdiction on the part of Judge Winner, nor does he allege that the deputies committed any act in obvious excess of that jurisdiction, such as executing a warrant that is void on its face.

While as to their general duties, marshals, court clerks, and other court officers are entitled to a qualified official immunity, see *Henriksen v. Bentley*, 644 F.2d at 852, 856 (10th Cir. 1981); *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1980), *cert. dismissed sub nom. Finley v. Murray*, ––– U.S. –––, 102 S.Ct. 1703, 72 L.Ed.2d 129 (1982); *Gillespie v. Civeletti*, *supra*, 629 F.2d at 641-642, quasi-judicial absolute immunity applies in a narrow range of actions, where a marshal or court clerk acts directly under the command of a court decree or explicit instructions from a judge. *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). As the United States Court of Appeals for the Fifth Circuit explains as to court clerks:

> The rationale is that, in this limited group of functions, the clerk of court acts as the arm of the judge and comes within his absolute immunity. See *Barr v. Matteo*, 360 U.S. 564, 569, 79 S.Ct. 1335, 1338, 3 L.Ed.2d 1434 (1959). No immunity extends to clerks of court acting outside the scope of their jurisdiction, as is true for judges. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 343, 20 L.Ed. 646 (1872).

Williams v. Wood, *supra*, 612 F.2d at 985.

The same may be said of deputy marshals acting under

[89] Though this theory is nowhere set forth in the complaint, it does provide a glimmer of imputed meaning for its otherwise amorphous allegations.

court order. See generally *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 616-617, 20 L.Ed. 745 (1871); *In re Neagle*, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The courts of appeals have recognized that the "cluster of immunities protecting the various participants in judge-supervised trials," *Butz v. Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978), includes court officials and individuals acting pursuant to a court directive. See *e.g.*, *Ashbrook v. Hoffman*, 617 F.2d 474, 476-477 (7th Cir. 1980); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Waits v. McGowan*, 516 F.2d 203, 206 (3d Cir. 1975); *Slotnick v. Stavisky*, 560 F.2d 31, 32 (1st Cir. 1977), *cert. denied* 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); *Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir. 1973); *Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3d Cir. 1969), *cert. denied* 396 U.S. 941, 90 S.Ct. 378, 24 L.Ed.2d 244; *Brown v. Dunne*, 409 F.2d 341, 343 (7th Cir. 1969); *Morrison v. Jones*, 607 F.2d 1269, 1273 (9th Cir. 1979) *cert. denied* 445 U.S. 962, 100 S.Ct. 1648, 64 L.Ed.2d 237 (198); *Williams v. Wood*, *supra*, 612 F.2d at 985 n. 3 and cases cited therein; see also *McCray v. State of Maryland*, 456 F.2d 1, 5 (4th Cir. 1972); *Young v. Peoria Housing Authority*, 479 F.Supp. 1093, 1096 (C.D.Ill. 1979). The Tenth Circuit as well has acknowledged this narrow exception. See *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981); *Wiggins v. New Mexico State Sup. Ct. Clerk*, 664 F.2d 812, 815 (10th Cir. 1981).

Nothing in the Judicial Code provides that the United States Marshal or his deputies shall sit as an *ad hoc* emergency court of appeals, either in review of orders otherwise within a district judge's jurisdiction or in supervision of a district judge's conduct. See 28 U.S.C. §§561 et seq. (1976). The Code makes a different remedy available. See 28 U.S.C. §§41-49, 1291-1292 (1976). This Court will not, therefore, hold the deputy marshals answerable in damages for not having served the appellate function. Particularly where, as here, a plaintiff assails the merits of a judge's orders rather than the specific manner in which the defendants executed them, permitting this kind of action against the deputy marshals would be manifestly

inappropriate: "[A] nonjudicial officer who is delegated judicial duties in aid of the court should not be a 'lightning rod for harassing litigation' aimed at the court." *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980), *quoting Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976); accord, *Wiggins v. New Mexico State Sup. Ct. Clerk*, 664 F.2d 812, 815 (10th Cir. 1981). If "acts alleged to [be] wrongful, were committed by the officer in the performance of an integral part of the judicial process," *Robichaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965), then the officer is absolutely immune from suit for damages.[90]

Since the complaint seeks damages and other relief[91] from deputies Baer, Dunn, Weisenhorn and Spencer for failing to defy the specific directions of a district judge acting within his jurisdiction, it shall be dismissed, notwithstanding that "serious errors may have been committed" by the judge in determining the basis "upon which the order . . . is issued." *Erskine v. Hohnbach*, *supra*, 81 U.S. (14 Wall.) at 617.[92]

IX. CLAIMS AGAINST JUSTICE DEPARTMENT AND F. B. I.

It is apparent upon the face of the complaint that plaintiff's claims against the United States Department of Justice and the Federal Bureau of Investigation are vulnerable to dismissal under Rule 12(b)(6). This Court notes at the outset that a suit against a federal agency for

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[90] A deputy U. S. Marshal following direct orders of a District Judge is in a far different position from the private co-conspirators held not to be immune in *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

[91] Claims for equitable and declaratory relief as against the deputy marshals are dismissed for the reasons previously set forth. See pp. 308-312 *supra*. The state law and common-law claims are dismissed as well. See p. 321 *supra*; *Sami v. United States*, 617 F.2d 755, 770 (D.C.Cir. 1979).

[92] Because its determination of the larger issues is dispositive, this Court does not rule upon defendant Peyton Baer's attack on service of process.

money damages is tantamount to an action against the United States itself, since any damages would be paid from the Treasury of the United States. See *e.g., Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947); *DSI Corp. v. Secretary of Housing and Urban Dev.*, 594 F.2d 177, 179-180 (9th Cir. 1979); *Beller v. Middendorf*, 632 F.2d 788, 798 n. 5 (9th Cir. 1980); *Blackburn v. Goodwin*, 608 F.2d 919, 923 (2d Cir. 1979). Just as the United States cannot be sued in its own name without its express consent, *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941), "the unincorporated departments and agencies of the federal government cannot be sued *eo nomine* unless Congress has explicitly or impliedly denominated the agency as amendable to such suits." *Hampton v. Hanrahan*, 522 F.Supp. 140, 147 (N.D.Ill. 1981); see *Blackmar v. Guerre*, 342 U.S. 512, 514-515, 72 S.Ct. 410, 411, 96 L.Ed. 534 (1951); *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1224 (7th Cir. 1979); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1136-1137 (5th Cir. 1980); *Schenker v. U.S. Parole Comm'n*, 85 F.R.D. 696 (D.Colo. 1980); *Pearlstine v. United States*, 469 F.Supp. 1044, 1046 (D.Pa.1979); *Conyugal Partnership v. Gracia*, 331 F.Supp. 521, 522 (D.P.R. 1971). Since plaintiff alleges what are in substance tort claims against the United States,[93] the Federal Tort Claims Act requirement that the claims first be presented to the appropriate federal agency applies. See 28 U.S.C. §2675(a) (1976); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). That requirement is jurisdictional and may not be avoided or waived. See *e.g., Three-M Enterprises, Inc. v. United States*, 548 F.2d 293, 294 (10th Cir. 1977); *Gregory v. Mitchell*, 634 F.2d 199, 203-204 (5th Cir. 1981); *Bruce v. United States*, 621 F.2d 914, 918 (8th Cir. 1980); *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980); *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d

[93] See Whitman, "Constitutional Torts," 79 Mich.L.Rev. 5 (1981); *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976) (§1983 "creates a species of tort liability . . .").

97, 104 (2d Cir. 1981); *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam); *Steele v. United States*, 599 F.2d 823, 825 (7th Cir. 1979); *DSI Corp. v. Secretary of Housing and Urban Dev.*, 594 F.2d 177, 180 (9th Cir. 1979); *Bialowas v. United States*, 443 F.2d 1047, 1049 (3d Cir. 1971). Merely filing suit in federal court does not satisfy this requirement, see *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972). The absence of an appropriate administrative claim mandates dismissal of the lawsuit as against the United States. See *e.g., Stephan v. United States*, 490 F.Supp. 323 (D.Conn. 1980). While *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), holds that a *Bivens*-type action may be maintained against *individual* federal officers independent of a parallel action under the Federal Tort Claims Act, 28 U.S.C.§2680(h), it does *not* so hold as to damages claims against the United States or its agencies. See also *DSI Corp. v. Secretary of HUD*, *supra*, 594 F.2d at 180; *Hampton v. Hanrahan*, *supra*, 522 F.Supp. at 148. Plaintiff's damages claims must, therefore, be dismissed. His claims for prospective relief suffer the same fate because of the complaint's failure to satisfy the requisite standards for equitable relief. Compare *e.g., Wounded Knee Legal Defense/Offense Comm. v. F.B.I.*, 507 F.2d 1281, 1287-1288 (8th Cir. 1974); see pp. 310-312, *supra*.

X. CLAIMS AGAINST THE DENVER POLICE AND THE STATE DISTRICT ATTORNEYS

In a nutshell, plaintiff seeks to recover damages from the City and County of Denver, named and unnamed Denver police officers and state district attorneys (1) for false arrest where no arrest occurred; (2) for malicious prosecution by persons who did not in fact prosecute; (3) for unspecified defamation of plaintiff in the news media by unspecified defendants; and for them having engaged in a deliberate pattern of "chilling" surveillance and record-keeping. Complaint, at ¶¶18-56.

A claim of false arrest is essentially an official

detention variant of the common-law tort of false imprisonment. Such a claim "protects the personal interest in freedom from restraint of movement." W. Prosser, Law of Torts §11, at 42, 45-47 (4th ed. 1971). Confinement is an essential element of false imprisonment or false arrest. See Restatement (2d) of Torts §§35(1)(b), 41 & comments a-h (1965); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). In fact, the Restatement (2d) of Torts defines arrest as "the taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law." *Id.*, §112 (1965).

While the complaint alleges that with invidiously discriminatory motives, the defendants acted in 1973 "to cause and make a warrant for a false and unfounded arrest of plaintiff," ¶37,[94] it is nowhere alleged that the warrant was ever executed. To the contrary, plaintiff fled the jurisdiction to avoid arrest and remained at liberty until 1980, when captured by federal authorities and held pursuant to a federal indictment. *United States v. Martinez*, 681 F.2d 1248, (10th Cir. 1982); *id.*, 667 F.2d 886, 887 & n. 1 (10th Cir. 1981).[95] Noting that "[t]he Constitution does not guarantee that only the guilty will be arrested," the United States Supreme Court declared:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 [97 S.Ct. 285, 292, 50 L.Ed.2d 251] (1976), false imprisonment does not become a

[94] Technically, ¶37 may sound in malicious prosecution rather than false arrest. See W. Prosser, Law of Torts §11, at 49 (4th ed. 1971).

[95] As noted above, a grand jury indictment, if proper in form, conclusively establishes probable cause for arrest. *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19, 95 S.Ct. 854, 864 n. 19, 43 L.Ed.2d 54 (1975); pp. 319-320 *supra*.

violation of the Fourteenth Amendment merely because the defendant is a state official.

Baker v. McCollan, 443 U.S. 137, 145, 146, 99 S.Ct. 2689, 2694, 2695, 61 L.Ed.2d 433 (1979). To state a claim under the Civil Rights Act, a plaintiff must not only allege confinement; he must show a deprivation of his "liberty . . . without due process of law." *Id.*; accord, *Lessman v. McCormick*, 591 F.2d 605, 609-611 (10th Cir. 1979).

Where, as here, a complaint does not even allege confinement, it is insufficient as a matter of law on both constitutional and common-law grounds. See *e.g., Harper v. Merckle*, 638 F.2d 848, 860 (5th Cir. 1981).

Similar defects plague Martinez' claims regarding malicious prosecution by the state defendants. Even assuming that malicious prosecution can state a claim under the Civil Rights Acts, cf. *Atkins v. Lanning*, 556 F.2d 485, 488 (10th Cir. 1977), the complaint does not allege even the bare elements of a malicious prosecution cause of action; neither the complaint nor the prior appellate opinions concerning the plaintiff disclose a criminal proceeding instituted or continued by the defendant against the plaintiff. W. Prosser, *Law of Torts*, §119 at 835; Restatement (2d) of Torts §654 (1977). It merely alleges that the state district attorney defendants provided information to the United States Attorney which led to the federal indictment and trial proceedings which did not terminate in the plaintiff's favor. See W. Prosser, *Law of Torts*, *supra*; Restatement (2) of Torts §§658-660 (1977). Beyond that, the decision by a state prosecutor to initiate a criminal proceeding is insulated from suit by *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) and the prosecutorial immunity it describes. See also *McDonald v. Lakewood Country Club*, 170 Colo. 355, 461 P.2d 437, 441 (1969); Restatement (2d) of Torts §656 (1977).

The Supreme Court recently reiterated its view that the Fourteenth Amendment and the Civil Rights Act are not intended to serve as "a font of tort law to be superimposed

upon whatever systems may already be administered by the States." *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981), *quoting*, *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). In *Paul v. Davis*, the court held that to establish a claim under §1983 and the Fourteenth Amendment more must be involved than defamation by a state official. *Id.*, 424 U.S. 693, 701-710, 96 S.Ct. 1155, 1160-1164, 47 L.Ed.2d 405 (1976).

The complaint does not allege what defamatory matter, if any, was published, nor specifically who published it. The single alleged nexus with constitutional due process alleged in the complaint is the purported intent of the defendants to deny plaintiff a fair trial through use of prejudicial pretrial publicity, compare *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), but the mistrial declaration rendered moot any question of the effect of the publicity upon the jurors in *Martinez*. No constitutional or civil rights claim is stated by paragraphs 41 and 48 of the complaint.

Even overlooking the fact that none of the 22 counts of the complaint speaks of liability for defamation, libel or slander, the allegations of the complaint must set forth what, in substance, is alleged to be defamatory.

> It is almost axiomatic that in defamation cases a certain degree of specificity is an essential in pleadings, that the language complained of must be set forth in *words* or *words* to that effect and that the defendant should not be required to resort to the ofttimes expensive discovery process to drag from a litigant what he really intends to do to his adversary by a vehicle shrouded in mystery.

Dennett v. Smith, 21 Utah 2d 368, 445 P.2d 983, 984 (1968) (emphasis in original). While strict *in haec verba* or *in totidem verbis* pleading of the defamatory matter is not necessarily required, the substance of the matter complained of must be alleged. See *e.g.*, *Okun v. Superior Court of Los Angeles County*, 29 Cal. 3d 442, 175 Cal. Rptr. 157, 629 P.2d 1369, 1379 (1981); 53 C.J.S. Libel and Slander

§164(b); cf. *Ramsey v. Zeigner*, 79 N.M. 457, 444 P.2d 968 (1968).

In *Martinez'* complaint, the substance of the defamation is nowhere alleged, rendering it once again vulnerable to Rule 12(b)(6).

Finally, plaintiff charges that the defendants engaged in surveillance and recordkeeping that unlawfully "chilled" his constitutionally protected freedoms of expression and association. Yet aside from one vague and insufficient allegation,[96] Martinez alleges no search or seizure of his person, house, papers and effects by the defendants without a warrant or other lawful authority. See Amend. 4, U.S.Const. Nor is it self-evident that investigatory recordkeeping by police agencies is *per se* a constitutional violation, even where the subject of the records is denied access to review them. Cf. *Federal Bureau of Investigation v. Abramson*, —— U.S. ——, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982).

Political activists pose their own dilemma. Warmed by the flames of their political, social or racial views, they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," ie., become in a factual and legal sense "public figures." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974). They invite attention and comment. They revel in publicity. Often with the best of motives, they seek the public forum and the mass media, hoping to communicate their message to a large audience. This is a liberty common to all citizens. See *Hague*

[96] Paragraph 62 of the complaint makes the bare-bones allegations that the F.B.I. — not the Denver Police — "installed or attempted to install a wiretap surveillance device in the Denver offices of Attorney Kenneth A. Padilla, plaintiff's defense attorney . . ." Mr. Padilla is not a party to this action. Plaintiff cannot seek damages for infringement upon Padilla's Fourth Amendment rights. While "electronic eavesdropping on conversations between plaintiff and his attorney . . . would be actionable if proved," *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978); *Adams v. Carlson*, 488 F.2d 619, 631 (7th Cir. 1973), such actual eavesdropping is not even alleged in paragraph 62.

v. C. I. .O., 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (Roberts, J.).

At the same time, however, many activists find themselves readily "chilled" by official attention. They want no police in their attracted audience. They wish their words recorded in the public mind, but not its official files. Activists come into federal court asserting a Fourth Amendment expectation of privacy in activities that at the same time are largely designed to attract serious public attention and concern. Therein lies the dilemma: how much privacy may one reasonably expect in one's public acts?

No one wishes to live in a society of the kind described in George Orwell's *1984* or Ray Bradbury's *Fahrenheit 451*, and no federal court is going to be willing to grant is imprimatur to police intrusion into the security of an activist's person, house, papers and effects without strict adherence to Fourth Amendment standards. The Constitution protects those who some government officials would deem "subversive" no less than others. See *United States v. United States District Court for the E.D. of Mich.*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C.Cir.1979).

Law enforcement officers, on the other hand, are entitled reasonably to see what there is to be seen[97] and to hear what there is to be heard,[98] provided that the Fourth Amendment is complied with. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). See also Christie, "Government Surveillance and Individual Freedom," 47 N.Y.U.L.Rev. 871 (1972).

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[97] *E.g., Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 2114 (1974) (health inspector observing smoking chimneys not a "search"); cf. *United States v. Kim*, 415 F.Supp. 1252 (D.Ha.1976) (F.B.I. agents using an 800 mm. telescope to look into defendant's apartment engaged in "search").

[98] *E.g., United States v. Fisch*, 474 F.2d 1071 (9th Cir. 1973) (overhearing of clearly audible conversation in adjoining motel room not a "search").

In cases such as *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975), courts have held that "mere police photographing and data gathering at public meetings" is "legally unobjectionable and creates at best a so-called subjective chill which the Supreme Court has said is not a substitute for a claim of specific present harm or a threat of specific future harm. [*Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-2326, 33 L.Ed.2d 154 (1972)]." *Id.*, 519 F.2d at 1337-1338.

> Nor does the sharing of this information with other agencies of government having a legitimate law enforcement function give rise to a constitutional violation. We cannot see where the traditional exchange of information with other law enforcement agencies results in any more objective harm than the original collation of such information.

Id., 519 F.2d at 1338.[99]

To maintain an action under the Civil Rights Acts, liability under 42 U.S.C. §1983 must be based upon the actual "deprivation of any rights privileges or immunities secured by the Constitution and laws" of the United States. *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966). Mere "allegations of a subjective 'chill' " resulting from otherwise lawful governmental activities is insufficient. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-2326, 33 L.Ed.2d 154 (1972). Even when one is alleging a conspiracy in violation of 42 U.S.C. §§1983 or 1985, "a plaintiff must allege and prove both a conspiracy and an actual deprivation of rights." *Hampton v. Hanrahan*, 600 F.2d 600, 622 (7th Cir. 1979); accord, *Holmes v. Finney*, 631 F.2d 150, 154 (10th Cir. 1980); *Taylor v. Nichols*, 558 F.2d 561, 567 n. 1 (10th Cir. 1977); *Briley v. State of California*, 564 F.2d 849,

[99] Plaintiff's counsel cites *Tate* for the proposition that such surveillance, recordkeeping and the disclosure of collected information is a civil rights violation. Plaintiff's Brief, at 41. The opinion itself reads much more narrowly, and to the degree that it deals with the effects of disclosure on a subject's reputation, it must be read in light of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

858-859 (9th Cir. 1977); Part VII, *supra*. "[I]t is the acts causing damage to the plaintiff that give rise to liability for damages, not the conspiracy itself." *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 576 (7th Cir. 1975). This is true even as to claims regarding surveillance or other investigative techniques allegedly used with malice or bad faith. See *e.g., Socialist Workers Party v. Attorney General of the United States*, 419 U.S. 1314, 95 S.ct. 425, 42 L.Ed.2d 627 (1974) (Marshall, J. in chambers); *Smith v. Nixon*, 606 F.2d 1183 (D.C.Cir. 1979); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C.Cir.1979); *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975); *United States v. Gonzalez-Rodriguez*, 513 F.2d 928 (9th Cir. 1975); *Paton v. LaPrade*, 471 F.Supp. 166 (D.N.J.1979); *Founding Church of Scientology v. Director of the F.B.I.*, 459 F.Supp. 748 (D.D.C.1978); *Raffety v. Prince George's County*, 423 F.Supp. 1045 (D.Md.1976).

Plaintiff alleges that the defendants' actions led to his indictment for criminal offenses by a federal grand jury. That alone does not state a cognizable constitutional claim.

Plaintiff's claims under the Colorado State Constitution as pleaded in Count XIV are wholly unidentified. Perhaps Martinez claims that defendants "violated his right to live a 'quiet, peaceful and unsullied' life and Article II, Section 3 of the Colorado Constitution." *Knowlton v. Cervi*, 142 Colo. 394, 350 P.2d 1066, 1067 (1960), but he does not so inform us. That count shall be dismissed. His other state law claims for negligent police investigation,[100] gross misconduct by public officials,[101] harassment, outrageous conduct,[102] and violations of the ABA Code of Professional Responsibility[103] are best deal-

[100] See *Cooper v. Hollis*, 42 Colo.App. 505, 600 P.2d 109, 111 (1979).

[101] See *Flournay v. McComas*, 175 Colo. 526, 488 P.2d 1104, 1106 (1971).

[102] See Restatement (2d) of Torts §46 (1965).

[103] Cf. *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied* 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977). The §1981 claim against these defendants is also dismissed for insufficient pleading.

with by the state courts, and with the dismissal of the plaintiff's federal claims, this Court cedes jurisdiction over them. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

For the reasons hereinbefore stated,[104] the plaintiff's complaint as against the state defendants shall be dismissed, including as to two defendants who have not yet so moved.[105]

XI. CLAIMS AGAINST PETER WEBB

The complaint's allegations of conspiracy and defamation against news reporter Peter Webb have no more substance nor give any more notice of the claim than they do as to the other defendants. They shall be and are therefore, dismissed.

XII. CONCLUSION

For the reasons set forth in this opinion,[106] the plaintiff's complaint shall be and hereby is DISMISSED as to all defendants. Those claims which have been dismissed for substantive reasons, *e.g.*, absolute immunity, or some other insufficiency at law, the dismissal is upon the merits. Those claims dismissed for procedural reasons, i.e., failure to plead particular or sufficient facts, see Rule 8(a), F.R.Civ.P., or to exhaust administrative remedies, are dismissed without prejudice. Plaintiff is hereby GRANTED leave to file an amended complaint in this action within 20 days of this date.

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[104] The plaintiff's equitable claims are dismissed for the reasons set forth in pp. 310-312, *supra*.

[105] Both Tooley and Garcia raise "failure to state a claim" as an affirmative defense in their pleadings. Cf. *Williams v. Patton*, 410 F.Supp. 1, 3 & n. 2 (E.D.Pa.1976); 2A Moore's Federal Practice ¶ 12.08 & n. 2 (2d ed. rev. 1981); *id.*, 1981-82 Supp. at 84.

[106] It is useful to note that had this case been remanded to the Colorado state court as plaintiff wished, the same standards would have been applied in evaluating his Civil Rights Act claims. See, e.g., *Espinoza v. O'Dell*, 633 P.2d 455 (Colo.1981).